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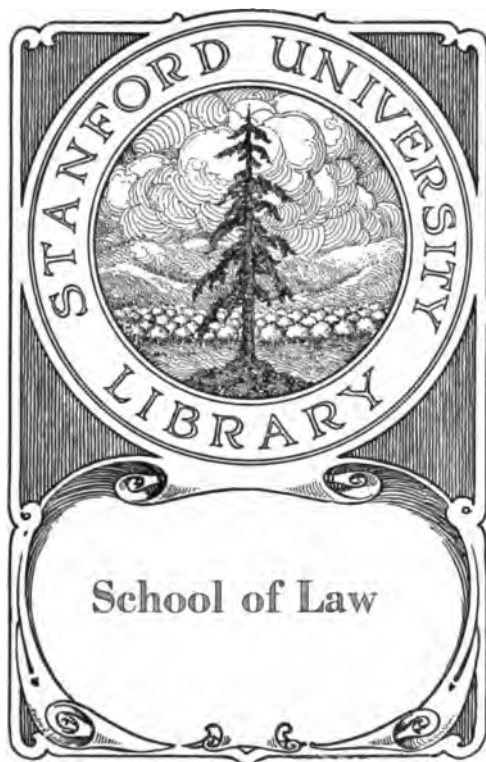
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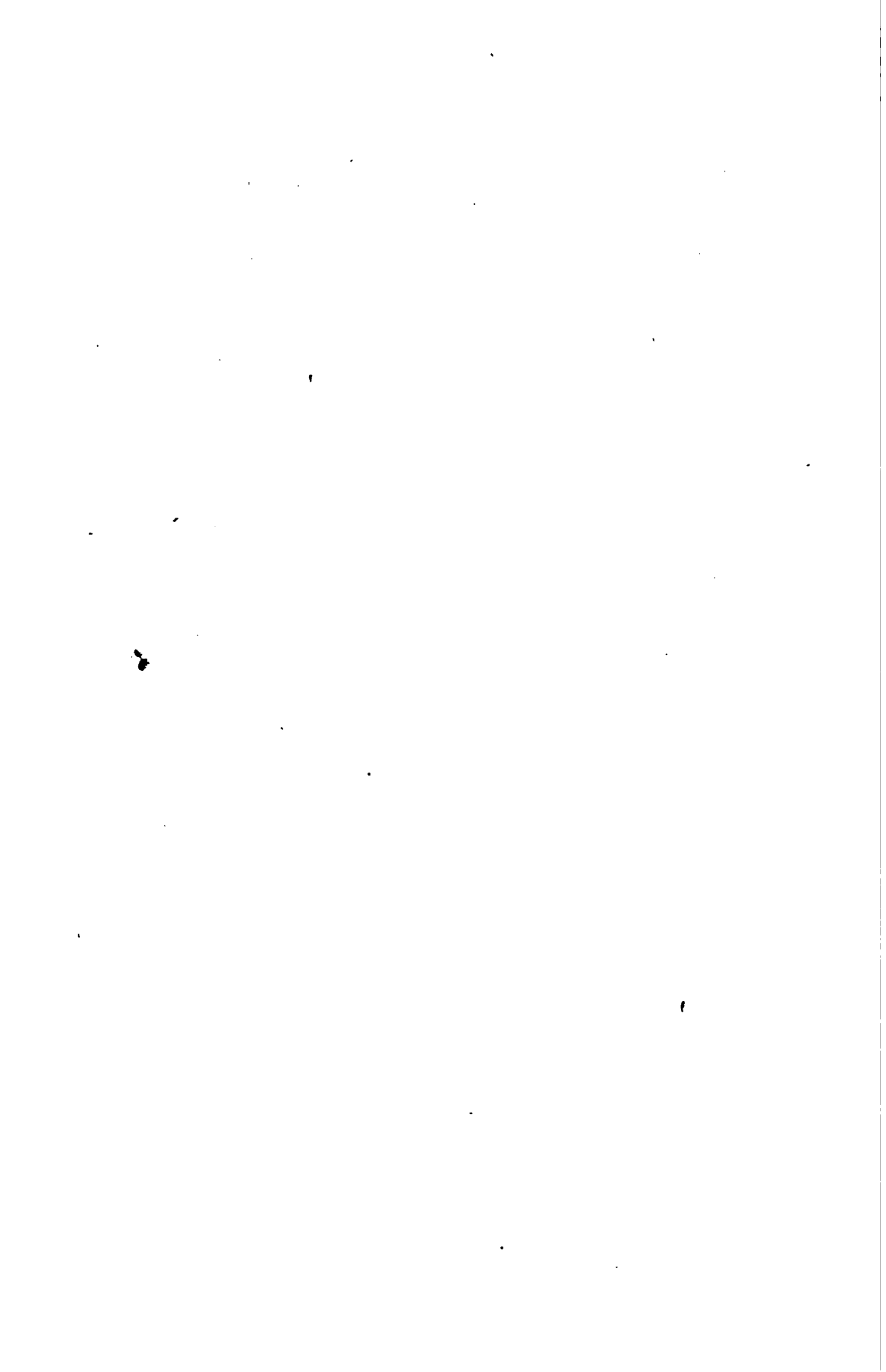
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HON. MR. JUSTICE LONGLEY.

None of His Majesty's judges have been so much in the public eye, for the past three months, as Mr. Justice Longley of the Supreme Court of Nova Scotia. This arises from the fact that the action of the Dominion Steel Company and the National Trust Company against the Dominion Coal Company was tried before him at Sydney; and his judgment was watched with keen interest.

This action so far as the number of persons pecuniarily interested effects the question, and the amount of money involved, is one of the greatest actions ever tried in any English speaking country. The existence of both the Steel and the Coal Companies was said to depend upon the result. This is probably an exaggeration, but it indicates the magnitude of the interests that depended upon the judge's decision. The Coal Company in bonds and stocks represents \$23,000,000, and the Steel Company \$35,000,000. These stocks and bonds are held in every part of Canada and the owners watched the proceedings closely. The Coal Company employs about 7,000 men, the Steel Company about 5,000. The question at issue finally resolved itself into a very narrow one, whether, under a contract for the supply of coal to the Steel Company for making steel, the latter had the right to name the seam from which the coal was to come, and named the Phalen seam—could the Coal Company supply coal from one part of that seam unfit for use in steel making, when it was mining and could supply from other pits on that seam coal that was fit. In other words was coal from the Phalen seam a specific description under the rule in *Chanter v. Hopkins*, 4 M. & W. 399, or was the Coal Company bound under the contract to supply coal fit for the purpose of steel making.

Reviewing the whole contract the judge held that it was a

contract to coal the Steel Company and that the primary and supreme object of the contract was the supply of coal for use in steel making. The principle adopted in applying the different provisions of the contract to attain the result was the classical words of Lord Bowen that the object of Courts is "to give efficacy to the transaction and prevent such a failure of consideration as cannot have been within the contemplation of the parties." Hence it followed that neither of the parties contemplated that under the contract coal could be supplied even from a seam specified that was absolutely useless to the Steel Company and which under the contract they could not sell.

The judgment in the Steel-Coal suit is under appeal, but its manner is in the best form of a judicial decision. First, the facts are set out with clearness, then come the findings from these facts, then a statement of the principles of law applicable to the findings followed by a brief review of the leading authorities that govern, and concluding by a statement of the remedies.

Mr. Justice Longley has been the subject of the highest encomiums from the Bar and the press, both as to the manner in which he tried the case and the reasoning upon which his judgment is based.

The judge has been an interesting figure among the public men of Canada for the past 30 years. He is about 57 years of age, and has been in the legislature of Nova Scotia since 1882. He was Attorney-General since 1884, and until his appointment to the bench in 1905. Nothing pleased the judge, when an active politician, more than an election, and nowhere was he so much at home as on the public platform. Perfectly conscious of his ability and knowledge of public questions he was always ready to meet in public debate the strongest men on the other side. Personality like his was sure to impress its mark on the policy of his party and, though he was only a provincial politician, it was he who persuaded the whole Liberal party to take up Unrestricted Reciprocity as its policy in the Dominion election of 1891.

The judge is a frequent and welcome contributor to periodi-

calls, and writes in a charming style. His life of Joseph Howe in "Morang's Makers of Canada" series is his best effort, and is a worthy tribute to that great Nova Scotian. He will have ready, in a short time, a political history of Canada since 1867, after the style of McCarthy's "History of Our Own Times," and no man in Canada has the political instinct necessary to write such a history in as high a degree as the versatile judge.

It is too soon yet to write of Mr. Justice Longley's work as a judge. That is in the making, but, undoubtedly, he will attain eminence in his judicial career. He is a man of untiring industry, perfectly fearless, and has a wide knowledge of men and of business, with a keen intellect and a judicial mind. What better equipment can a man have to attain the very highest place among judges who have made and are making the common law.

*ENGLISH LAW CODIFIED—THE WHOLE LAW OF
ENGLAND.*

LORD HALSBURY, EDITOR-IN-CHIEF.

The first volume of this work has been issued. It is proposed to complete the work in 22 volumes. The object of this publication is as stated on the title page, "A complete statement of the whole law of England by the Right Hon. the Earl of Halsbury and other lawyers." His Lordship occupies the position of active editor-in-chief, and the revising editors include such men as the Hon. Sir Chas. Swinfen Eady, one of the Chancery Judges, assisted by T. H. Carson, K.C., Arthur Underhill, a leading conveyancing counsel, T. Willes Chitty, barrister, and William Mackenzie, barrister. There are besides these editors a number of sub-editors of prominence in the legal profession.

The titles of the first volume have been contributed by very prominent and eminent members of the Bench and Bar, and regard has been manifestly had with reference to the special qualification of the writer of each particular subject.

The volume contains about 650 pages, in addition to the index, which is very full and very carefully prepared.

Dealing with the general scope of the work, it may be useful to point out that heretofore the editor or compiler of this class of legal publications has confined himself to one or two things, first, an encyclopædia, which is more or less an enlarged digest of case law, but which was somewhat more extended in the American and English Encyclopædia, or, secondly, to a list of leading cases annotated. While these methods render reference comparatively easy, they fall short of being a complete compendium of the law of the country to which they relate. The present work opens up a wider field, and consists of a series of carefully written articles upon practically every subject known to the law, and combines all the benefits to be derived from textbooks, encyclopædias, and digests of case law. Instead of being a mere collection of references, the text deals with principles, collected from the authorities, and, for ordinary purposes, gives in a compact form all the law relating to any matter likely to arise in the course of one's practice. In other words the work is a comprehensive codification of principles of the English law.

The difficulty heretofore met with in works of this nature has been that the results of the decisions of courts have been stated, rather than the principles upon which such decisions are based, and it is often found on reading the report referred to, that the case turned largely on the facts, and thus in no way aided the enquiry as to the law applicable to facts more or less different. Here, however, the general principles governing all facts are succinctly and clearly stated, and special distinction is made where exceptions arise or certain facts have to be considered.

To illustrate this more clearly, a paragraph may be taken at random from any page of the first volume, say, the head of "Agency,"—a title dealt with in about one hundred pages. At page 212, there will be found the following:—

"Wherever a principal has authorized an agent to do 'a particular class of acts on his behalf, he is responsible' for any act even though felonious (*Osborn v. Gillett* (1873) L.R. 8

Exch. 88), done by the agent which falls within the scope of his authority as measured by reference to his ordinary duties (*Cheshire v. Bailey* (1905) 1 K.B. 237, per Mathew, L.J., at p. 245.) The onus of proof is on the plaintiff (*Beard v. Lon. Gen. Omnibus Co.* (1900) 2 Q.B. 530) however improper (compare *Udell v. Atherton* (1861) 7 H. & N. 172, with *British Mutual Bank v. Charnwood Forest Rail Co.* (1887) 18 Q.B.D. 714 (fraud) and several other cases noted), or imperfect (compare *Whatman v. Pearson* (1868) L.R. 3 C.P. 422, with *Storey v. Ashton* (1869) L.R. 4 Q.B. 476, and other cases noted), the manner in which the authority is carried out, provided that the act is done for the principal's benefit (compare *Mackay v. Commercial Bank of New Brunswick* (1874) L.R. 5 P.C. 394, with *British Mutual Bank v. Charnwood Forest Rail Co.*, supra) and not for that of the agent (*Coleman v. Riches* (1855) 3 C.L.R. 795). It is immaterial that the act in question has been expressly prohibited by the principal (*Limpus v. Lon. Gen. Omnibus Co.* (1862) and other noted cases)."

The law as it stands is very clearly and concisely put, and the text is not burdened with dissertations or arguments by the authors. They content themselves with setting forth in plain language what the courts have decided and declared to be the law under the various divisions and sub-divisions freed from incidental and surplus matter. The work, as to completeness, lucidity and practical advantage, may be designated as monumental.

The work is published by Messrs. Butterworth & Co., of London, jointly with the Canada Law Book Company, Limited, of Toronto, Canada, who control the sale of it in Canada and the United States.

WHY NOT ABOLISH "DIRECTORS."

The natural meaning of "director" is one who directs. But the legal signification of the word is quite different from the popular idea. This is not the only example of law not being quite in line with the ideas of the man in the street. Jurisprudence however takes notice of conditions which laymen fail to appreciate. Under modern business methods the "control" of any corporation is essential to its success. That means that the executive officers, and not the directors or the shareholders, run (to use an expressive metaphor) the company. It generally happens that the executive officers are directors. If so, then they, as directors, expect their fellow directors to agree with them. And the former generally do so, and the bigger the company the less can they do otherwise.

One cannot shut one's eyes to the fact that no one, other than those in constant touch with the details of the management, bookkeeping and financial methods of a company, can possibly understand what is going on, much less, effectively or usefully interfere. Hence directors as a rule do not and cannot direct, and in a business sense ought not to direct. Those who manage should be the "directors" and the rest of the Board should disappear or cease to bear this misleading and useless title.

Keeping in view then that the law looks at actualities and not popular impressions, and with due regret that they almost inevitably differ, it is easy to understand why Courts of justice hesitate to throw responsibilities for the millions that are lost by the executive officer or officers upon those who are designated by an inappropriate title, and who have fulfilled faithfully, at all events, the limited duties that are permitted to outside directors.

It is true that the shareholders of a limited or unlimited company correspond, in some senses, to the members of an ordinary partnership. But there were essential differences between the two classes (quite apart from those arising from the constitution of joint stock companies) even before the enactments which settled the formation and conduct of these cor-

porations. See for example of an old-fashioned joint stock company the case of *Womersley v. Merritt* (1867) L.R. 4 Eq. 695. The most important difference was the inability of the shareholders, except at stated intervals in general meeting, to interfere with its concerns or to bind the company: a power belonging to members of a partnership. In fact joint stock companies were formed with the expressed idea of allowing their members to participate in the profits without being liable for the losses, a condition of affairs naturally following from the fact that they had no real voice in the management and no control as to who should or who should not be admitted into the concern.

The relationship of the shareholders inter se is not identical with their rights and obligations towards the entity known as the company, nor are the rights and obligations of the company enforceable against the individual shareholders in a limited company. Each partner is the agent of his co-partners, but no such position is enjoyed by shareholders towards each other, nor is a shareholder the agent of the company: *Burnes v. Pennell* (1849) 2 H.L.C. 497. The shareholder has merely a defined and aliquot part in the assets which belong in law to the company as such, and his interference is limited to such matters as are permitted by the special or general Act which governs his company. The immediate superintendence of the company's affairs is delegated to a portion of the members called directors. Their position is that of agents merely and they are the only agents competent to bind the company. But they are joint agents and can only bind the company, speaking generally, when they act in a duly constituted meeting, and then by a majority when such a provision exists for their governance. It is true that in certain corporations and under certain conditions the acts of some directors holding defined positions, which carry with them stated powers, can, within the scope of these powers, bind the company. The relation of the directors to the company, and through it to the shareholders, do include matters which are not merely affairs of agency; but the principle of agency runs through all ideas of their responsibility and must

be the final test by which they are to be judged. Kekewich, J., in *Re Liverpool Household Stores* (1890) 59 L.J. Ch. 616, says that the responsibility of directors rests for its ultimate sanction on the broad basis of the law respecting principal and agent.

To accept the position of agent is to burden oneself with many responsibilities. But they are limited to such as come within the scope of the agency. If an agent is elected as one of a number it is fairly obvious that all cannot act in everything. Each must have his assigned duty and if due care is taken in allocating the work and in seeing that it is performed, the joint executive action would seem to be fairly outside the realm of criticism. Where there are hundreds of shareholders, having each a defined share in the company's assets, the employment of the aggregate capital means, if money is to be made, an infinite multiplication of small operations, each of which involves in its turn smaller details of work either manual, executive, financial, or co-operative. The consequences of these have to be worked out with infinite patience and skill and the results presented for ultimate action.

If this is all done by ideal persons and in a flawless manner the final outcome must be good. The work described cannot, however, be all done by directors; they must act through and by others; they must necessarily trust those others, not merely for the financial results, but for the practical doing of the work and for its faithful report. Even those who are actually the executive officers and who have to take a part antecedent to the final action, must rely on those under them. The chain of responsibility ends somewhere and must also begin somewhere. Where then is exactly to be found the actual responsibility? That is the weak point in the cable, a weakness almost inevitable in all concerted human action. What also is the exact measure of that responsibility? It must be admitted that both vary according to the position, means of knowledge, honesty, actual participation and time of those involved. And, as they do vary, then the law, looking into the actual facts, must determine with due regard to what really exists, and not upon the popular and probably very natural generalization from broad premises.

It must be remembered that the shareholder while helping to elect his agents is not, by the very constitution of the company, liable for that agent's mistakes and only suffers where they are serious enough to involve his individual share. He reaps the benefit however of that agent's successes to the full. Can he then quarrel with an exact distribution of the liability for the losses when he insists upon having the profit which flows from the aggregate ability and faithfulness of all his agents and their co-workers?

This may serve as an explanation of the views laid down by judges in determining liability in case of losses caused, not by all, but by some of the agents to whom has been rightfully given a certain, and perhaps a controlling share, in the actual management of a company's affairs.

Speaking generally the test of liability must, for its solution, involve a consideration not only of the actual facts which occur, but of the method of dealing with them at the time they do occur, and the knowledge, actual or imputed, then possessed by those who have to determine the action taken. And this test must not be based on what one learned judge calls "the easy but fallacious standard of subsequent events."

The position of directors has been likened to that of trustees. That their office is one of trust, which, if undertaken, must be performed fully and entirely, is the statement of Lord Romilly in *York and North Midland Railway Company v. Hudson* (1853) 16 Beav. 485, 491; and, in respect to the capital of the company which is under their management, it has been said that they are "quasi-trustees": *Flitcroft's Case* (1882) 21 C.D. 519, 534. These somewhat general definitions are more fully explained in other cases. In *Great Eastern Railway Company v. Turner* (1872) 8 Ch. 149, 152, Lord Selborne thus expresses his view:—

"The directors are the mere trustees or agents of the company—trustees of the company's money and property—agents in the transactions which they enter into on behalf of the company,"

The American standpoint is put in *Bloom v. National United Company* (1897) 152 N.Y. 114, "Directors are trustees in their relations towards the corporation but not in their relations towards the shareholders."

Jessel, M. R., expresses the opinion that if there has been any error at all in the course taken by the Courts of Equity it has been in pressing honest trustees too far. He therefore leans to the view (*In re Forest of Dean Mining Company* (1878) 10 C.D. 450) that directors are commercial men, managing a trading concern for the benefit of themselves and of all the other shareholders of it. They are no doubt trustees, he says, of assets which have come into their hands.

In a subsequent case, *Smith v. Anderson* (1880) 15 C.D. 247, Lord Justice James points out what he calls the broad distinction between trustee and director, an essential distinction founded on the nature of things:—"A trustee," he says, "is a man who is the owner of the property and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his cestuis que trustent. The same individual may fill the office of director and also be a trustee holding property, but that is a rare, exceptional and casual circumstance. The office of director is that of a paid servant of the company. A director never enters into a contract for himself, but he enters into contracts for his principal, that is, for the company for whom he is a director and for whom he is acting. He cannot sue on such contracts nor be sued on them unless he exceeds his authority."

Lord Justice Brett concurs in this distinction. Stirling, J., in *Leeds Estate Co. v. Sheppard* (1887) 36 C.D. 787, considers directors as trustees or quasi-trustees of the capital of the company and liable for any breach of duty as regards the application of it. In *Re Faure Electric, etc., Co.* (1888) 40 C.D. 141 Kay, J., says that directors are certainly not trustees in the sense of those words as used with reference to an instrument of trust such as a marriage settlement or a will: "One obvious

distinction is that the property of the company is not legally vested in them. Another, and perhaps still broader difference, is that they are the managing agents of a trading association and such control as they have over its property and such powers as by the constitution of the company are vested in them, are confided to them for purposes widely different from those which exist in the case of such ordinary trusts as I have referred to, and which require that a larger discretion should be given to them. Perhaps the nearest analogy to their position would be that of managing agent of a mercantile house to whom the control of its property and very large powers of management of its business are confided, but there is no analogy which is absolutely perfect. Their position is peculiar because of the very great extent of their powers and the absence of control, except the action of the shareholders of the company. However it is quite obvious that to apply to directors the strict rules of the Court of Chancery with respect to trustees might fetter their action to an extent which would be exceedingly disadvantageous to the companies they represent." (pp. 150-1).

He cites with approval the earlier opinion of Lord Justice James in *Marzetti's Case* (1880) 28 W.R. 541, 543, that, "a director should not be held liable upon any very strict rules such as those, in my opinion, too strict rules which were laid down by the Court of Chancery to make unfortunate trustees liable. Directors are not to be made liable on those strict rules which have been applied to trustees."

In *Re Sheffield etc., Co. v. Aizlewood* (1889) 44 C.D. 412, at p. 452. Stirling, J., says that he takes it as established law that directors of trading companies are not trustees in the sense in which that term is used in settlements and wills, and that the rule laid down in *Re Faure Electric Co.*, is applicable to the directors of building societies. He quotes, also, with approval, the remarks of Lord Justice Cotton in *Marzetti's Case*. "Trustees are liable, whatever trouble they take, if the fund in their care goes not according to the trust. Opinions of counsel, *bonâ fides*, or care do not protect them. Now directors

are confidential agents with the liabilities of trustees, but they have a large discretion, and if they act bonâ fide they are relieved, and are not liable for want of judgment or error if they make a payment which is in fact not for the purposes of the company."

In *Re Sharpe* (1892) 1 Ch. 154, directors were held liable for ultra vires payments, and, being in the position of trustees, were not entitled to set up the Statute of Limitations. This was before the recent legislation allowing them to do so.

In *Re Lands Allotment Co.* (1894) 1 Ch. 616, 631, Lindley, L.J., says: "Although directors are not, properly speaking, trustees, yet they have always been considered and treated as trustees of money which comes into their hands or which is actually under their control, and ever since joint stock companies were invented directors have been held liable to make good moneys which they have misapplied upon the same footing as if they were trustees and it has always been held that they are not entitled to the benefit of the old Statute of Limitations because they have committed breaches of trust and are in respect of such moneys to be treated as trustees."

In *Percival v. Wright* (1902) 2 Ch. 421, Swinfen-Eady, J., declined to hold that directors were trustees for individual shareholders. In *Turquand v. Marshall* (1869) L.R. 4 Ch. 376, Hatherly, L.C., decided that the whole body of shareholders could not maintain an action against the directors to recover the money they had lost by the misrepresentation of the directors but that each must bring his separate action. But this as pointed out in *Re National Bank of Wales* (1899) 2 Ch. 629, by Wright, J., and by Lindley, L.J., at p. 652, was because the company was not incorporated. Where the right of a shareholder to sue comes through the corporation it must, if it declines to litigate, be made a defendant: *Henderson v. Blain* (1891) 14 P.R. 308.

This latter position is dealt with in *Hamilton v. Des-Jardins Canal Co.* (1849) 1 Gr. 1, and in *Burland v. Earle* (1902) A.C. 83. In the former case it was held that individual corporators,

even when described as proceeding on behalf of themselves and all other corporators, could not sue unless they could shew that no means existed of setting the corporation in motion, and this whether the acts complained of were void or merely voidable. The complaint was the disposition of the entire funds of the company even in a manner not permitted in trustees. In the latter case it was decided that the acts questioned must be shewn to be either fraudulent or ultra vires and that the majority of the company's shares were controlled by those against whom relief was sought and that no mere informality or irregularity which could be remedied by the majority would entitle the minority to sue. It will be observed that this restricts the rule to cases where the acts are illegal or ultra vires and in that sense void.

Some specific instances in which directors have been treated as if they were trustees under special circumstances may be quoted.

In the case of the *Land Credit Co. v. Lord Fermoy* (1870) 8 Eq. 7, 5 Ch. 763, directors were held liable to repay amounts paid out of the company's funds to purchase shares in the company, knowledge being brought home to the directors. In *Re Faure Electric Co.* (1888) 40 C.D. 141, payment of brokerage or commission to a stockholder for placing the company's shares was held to be illegal and the directors liable as for a breach of trust, they not being authorized even by a power given by the memorandum of association to do whatever might be "conducive to" the specific objects of the company. But they were exonerated from responsibility as for a misfeasance for consenting to a transfer to a shareholder of the shares so placed, there being no dishonest dealing charged. This liability for brokerage has, however, been denied by the Court of Appeal in a subsequent case; *Metropolitan Coal Consumers Co. v. Scrimgeour* (1895) 2 Q.B. 604. In *Re Iron Clay Brick Co., Turner's Case* (1889) 19 O.R. 113, a director was made responsible either as a trustee for, or as agent of the company for the profit upon a resale of a property of the company bought

by him under a judgment and execution against the company held by himself. In *Re Geo. Newman & Co.* (1895) 1 Ch. 674, directors were compelled to repay amounts paid to them, as for services rendered, by resolution of the directors, sanctioned by all the shareholders, but which were held to be presents to them, the articles not containing any power to make such presents to directors.

It would seem from the above that the position of directors, unless they abuse their fiduciary relationship and either wrongfully part with the assets or receive a profit incompatible with their position, is more that of business agents than legal trustees. The error of trustees for which they are held liable is always absolute and a breach of the trust they have to administer. The error of directors, except when it amounts to personal fraud or misdoing is always excused by the theory that if fair business intelligence, and the usual commercial methods are employed, the agents are not insurers of their employers' property and are not to be judged by the inflexible rule of mere results. The point of view is shifted from the slavish adherence to the law of trusts and its rigid consequences to the broader methods of modern business. Gross neglect takes the place of mere deviation from expressed duty.

This is best seen by considering the cases shewing the consequences of want of enquiry which would have produced knowledge on the one hand and those which involve actual knowledge or fraudulent abstention from enquiry on the other, in relation to such subjects as capital and income, balance sheets, dividends, interest, and borrowing, the principles of which are quite outside the narrow defence which alone is open to a trustee.

It may be said at the outset that constructive default, so easily applied to a trustee, is unknown as a reason for holding a director liable. The Court of Appeal consisting of Jessel, M.R., James and Bagallay, LL.J., affirming Bacon, V.-C., in *Hallmark's Case* (1878) 9 C.D. 329, 332, said that there is no case except *Ex parte Brown*, 19 Beav. 97, which shews that it

is the duty of a director to look at the entries in any of the books, and that it would be extending the doctrine of constructive notice far beyond that, or any case to impute to the director in question the knowledge that his name had been entered on the register for fifty shares. And that although he was a director (no share qualification being necessary) and attended meetings, he was not liable as a contributory. This rule finds expression in both England and America, see *Ex parte Cammell* (1894) 1 Ch. 528, 534, 2 Ch. 392; *Cartmell's Case* (1874) L.R. 9 Ch. 691; *Briggs v. Spaulding* (1891) 141 U.S. 132; *Warner v. Pennoyer* (1897) 82 Fed. Rep. 181; Cook on Corporations, section 703.

Lord Davey in *Dovey v. Cory* (1901) A.C. 477, at p. 493, agrees that directors are not bound to examine entries in the company's books.

Jessel, M.R., in *Re Forest of Dean Co.* (1878) 10 C.D. 450, at p. 451, said that one must be careful not to press so hardly honest directors as to make them liable for constructive defaults. A trustee, he points out, may be liable as for wilful default for neglecting to sue, but not directors by virtue of their discretion as business agents, which must not be too much interfered with by the Court.

In *Denham & Co.* (1883) 25 C.D. 752, Chitty, J., held that as no man is bound to presume a fraud, directors are not bound to examine entries in the company's books; and in *Ex parte Overend, Gurney & Co.* (1869) 4 Ch. 460, Selwyn, L.J., while considering the series of transactions as lamentable and not to be justified on any principles of commercial morality or prudence, held the true test to be whether actual and not merely constructive notice was brought home to Overend, Gurney & Co. And in this judgment Giffard, L.J., agreed. But where positive fraud or actual misapplication of the company's funds is found as in *Northern Navigation Co. v. Long* (1905) 11 O.L.R. 230, and in *Re National Funds Assurance Co.* (1878) 10 C.D. 118, the distribution of the moneys among the share-

holders themselves is no answer to a charge of misfeasance at the suit of the company or of a liquidator.

Closely allied to this matter is the crucial question as to what amount of carelessness may be justified and where the line between constructive notice on the one hand and the responsibility arising from wilful abstention from enquiry on the other is to be drawn.

Lord Campbell in *Reg. v. Esdaile* (1858) 1 F. & F. 213 held that mere negligence would not sustain a charge of conspiracy to issue false balance sheets. In *Burnes v. Pennell* (1849) 2 H.L.C. 497, Lord Brougham laid it down that liability must be traced to some specific fraudulent conduct, some grossly fraudulent conduct, which gave rise to the executed contract in question. Andrews, J., in *Therien v. Brodie*, 4 Q.S.C.R. 23, considered that there must be some individual fault on their part personal to themselves before directors can be made liable.

How far has negligence approached grossly fraudulent conduct and to what extent is it an individual fault, and not merely the absence of a positive well-doing?

Turquand v. Marshall (1869) 4 Ch. 376 may be said to be the earliest leading case in which the question has been considered. Lord Hatherly, L.C., speaks of it as to a great extent a new case. He laid down the principle that however ridiculous and absurd the conduct of the directors might seem, yet it was the misfortune of the company that they chose such unwise directors and no recovery could be had for un wisdom unaccompanied by fraudulent and improper acts. This decision reversed in part the decree of Lord Romilly, M.R., and covered the carrying on of the company after one-fourth of the capital was lost, including bad debts as good, and allowing directors to overdraw their accounts. The same judge, and Sir W. M. James, J.J., in *Land Credit Co. v. Lord Fermoy* (1870) 5 Ch. 763, held a director not liable for mere negligence in not enquiring whether borrowers were solvent and what was to be done with the moneys, and again reversed Lord Romilly who

had held all the directors liable as trustees; responsible as such for the due employment of the funds entrusted to them.

Lord Hatherly in the same case laid down a doctrine, since completely established, that a director cannot be liable for being defrauded; to do so would render his position intolerable.

In *Rance's Case* (1870) 6 Ch. 104 Sir W. M. James, L.J. and Sir G. Mellish, L.J., held directors liable as for gross neglect of duty and a *mala fide* proceeding in declaring a dividend without a balance sheet which any mercantile man could properly make out. Both held that the case would have been different had a balance sheet been made out by an actuary or by the directors themselves under the deed of association.

Parker v. McQuesten (1872) 32 U.C.R. 273 reviews the cases upon fraudulent balance sheets and decides that not only must the balance sheets be false and fraudulent but that the directors must know that they are false and fraudulent.

Jessel, M.R., in *Re National Funds Assurance Co.* (1878) 10 C.D. 118, expresses the view that a *bonâ fide* act is not made out by shewing that there was no intention to commit a fraud and that when the plain and patent facts are brought to his knowledge a director cannot escape liability by shewing that some one told him that he was not doing wrong or that somehow or other he convinced himself he was not doing wrong. In *Re Denham & Co.* (1883) 25 C.D. 752 Chitty, J., absolved a director, who was a country gentleman and not a skilled accountant from liability, because he was deceived by falsified accounts (certified by an experienced and reputable professional accountant) and by fraudulent verbal statements made to him by the chairman and one of the directors.

Stirling, J., in *Leeds Estate Co. v. Shepherd* (1887) 36 C.D. 787, considers *Rance's Case*. (ante) as consistent with the proposition that directors who are proved to have in fact paid a dividend out of capital fail to excuse themselves if they have not taken care to secure the preparation of estimates and statements of account such as it is their duty to prepare and submit to the shareholders, and have declared the dividends complained

of without having exercised thereon their judgment as mercantile men upon the estimates and statements of account submitted to them. He decides that while directors were entitled to trust entirely to the secretary, manager and auditor who prepared the statements then in question they must exercise some judgment with regard to them, as the articles of association required them to cause estimates to be prepared and upon those estimates to declare a dividend and they were not justified in delegating that duty to the secretary. He finally held them liable for (1) not requiring the proper mode prescribed by the articles as to estimates to be followed, (2) failing to instruct the auditor to report on them as prescribed by the articles and (3) for acting on the statement of the secretary without any verification, except the audit so imperfectly made.

In *Sheffield Building Society v. Aislewood* (1889) 44 C.D. 412 the same judge refused to hold directors liable for advancing money on a speculative security where they relied on the reports of a valuation by a competent valuator and did not know that the security was in fact an improper one. But in *Re Cardiff Savings Bank* (1890) 45 C.D. 537 he again fixes a director for failing to comply with the rules, which specific default permitted fraud by another, the auditor.

Vaughan Williams, J., in *New Mashonaland Co.* (1892) 3 Ch. 577, agrees with the view of Stirling, J., in the *Leeds Case* (ante) that directors who do not actually exercise their judgment are in the same position as those who are guilty of gross negligence.

In *Re Kingston Cotton Mills* (1896) 2 Ch. 279 an auditor escaped liability where he relied on the manager's certificate as to the amount of stock, on the ground that it was not the auditor's duty to take stock.

The liability of a director was exhaustively considered in a case reported as *Re National Bank of Wales* (1899) 2 Ch. 629 and afterwards in the House of Lords, as *Dovey v. Cory* (1901) A.C. 477. Wright, J., held the director, Cory, liable notwithstanding his defence that he knew nothing of what was going

on and trusted the general manager and the chairman who was his brother. The ground of liability was that the representations put forward to the shareholders on which dividends were declared were of matters which, by the articles of association, the latter were precluded from investigating for themselves, and were therefore representations by the directors which implied that they had personally taken reasonable steps to ascertain that the statements were true. But as to moneys improperly advanced to customers he considered that folly and imprudence were not enough and that interest, fraud or bad motive must be shewn. In the Court of Appeal it was held (p. 663) that the new statute of limitations applied and that the director was not liable after his retirement. But upon the main question the Court (Lindley, M.R., Sir F. H. Jeune and Romer, L.J.) declined to adopt the views of Wright, J., saying (p. 667), "But negligence is one thing; fraud is another," and holding that Cory did not act fraudulently in making reports to the shareholders as held by Wright, J. The Court lay down the proposition in this case, as was done in *Lagunas Nitrate Co. v. Lagunas Syndicate* (1899) 2 Ch. 392, that if the directors act within their powers, if they act with such care as can be expected from them, having regard to their knowledge and experience, if they act honestly for the benefit of the company, they discharge their equitable as well as their legal duty to the company. That measure of care is, speaking generally, what the law requires when there is no contract affecting the question. The real gist of the decision on the point involved is that it was not Cory's legal duty to test the accuracy or completeness of what he was told by the general manager and the managing director and that business could not be carried on upon principles of distrust and that it was too heavy a duty to lay upon a director to charge him with negligence in trusting the officers under him not to conceal what they ought to report to him. "A director (p. 675) does not warrant the truth of his statements; he is not an insurer." But he is liable unless he can shew that he made the statements honestly, believing them to be true, and

took such care to ascertain the truth as was reasonable at the time.

The *Leeds Case* (ante) was put upon the ground that the directors delegated their duty to their manager and did not even see that he did what he ought to have done. Upon appeal to the House of Lords (1901, A.C. 477) the decision was upon the main principle affirmed and the case forms the most important reference upon the subject. The judgment is, as stated by Lord Halsbury, L.C., entirely upon the question of fact whether or not Cory was guilty of a breach of duty. The nature of the business and the relation of Cory to it and the usual course of business pursued in the bank, are considered as important factors. It appears that the usual course was followed, weekly statements from each branch were sent in, examined by the manager and left in the board room for reference if the report of the manager disclosed anything which required attention. Inspectors reported to the manager on the branch banks. Auditors only saw the head office books and the returns (not the weekly statements) from the branches. What was really sought to be made the test of Cory's responsibility was that he did not find out what was fraudulently withheld from him. The Lord Chancellor makes the pointed observation that if it be the duty of a director to guard against possible fraud, an intelligent devolution of labour is impossible and asks "Was Mr. Cory to turn himself into an auditor, a managing director, a chairman and finds out whether auditors, managing directors and chairmen were all alike deceiving him? Lord Davey agrees in effect with Mr. Justice Stirling in *Re Leeds Estates, etc., v. Shepherd* (8187) 36 C.D. 787 and considers that neglect to cause proper estimates as required by the articles of association amounts to culpable negligence or reckless indifference in the performance of a director's duty.

In the last two cases upon the subject (the source of both Canadian) *Préfontaine v. Grenier* (1907) A.C. 101, and *Stavert v. Lovitt* (infra) the case of *Dovey v. Cory* is followed. In the former it is held that a president of a bank is not liable for neg-

ligence simply by reason of his having in good faith failed to detect the cashier's concealment of overdrafts, the cashier being the executive officer of the bank under the directors and that the fact that the president was remunerated for his services made no difference.

Stavert v. Lovitt (1907, Nova Scotia, not yet reported) a case against the directors of the Bank of Yarmouth is to the same effect and Mr. Justice Longley after referring to the leading cases says that "The directors had no reason for doubting the fidelity of Johns up to the final disclosure of his unauthorized and fraudulent conduct and they cannot be held responsible for failing to detect his misrepresentations."

The case is remarkable in this that it clearly covers want of capacity to grasp the situation. Mr. Justice Longley remarks that the evidence sustains all the reasons alleged for contending that the directors should have known (and this, it is submitted, is extremely near to constructive notice) but states that, as he understands the law, "Their failure to grasp the importance of each or any of these indicia will not make them responsible. In the absence of fraud or bad motive of any sort, they must be put down to errors of judgment and want of proper capacity to manage the finances of such an institution."

One interesting case may be referred to, that of *Re Cardiff Savings Bank, Marquis of Bute's Case* (1892) 2 Ch. 100. The Marquis was a mere figurehead and attended no meetings of the company of which he was a director. Stirling, J., discusses his liability owing to his non-attendance at any of the meetings and holds it not to be the same sort of neglect as the omission of the duty to be done at those meetings unless he had notice that there were in fact no meetings held or that none of the duties necessary to be done were performed at them.

A long line of cases upon the effect of knowledge or means of knowledge in regard to statements and prospectuses are only of interest so far as the effect of means of knowledge involves responsibility.

Kekewich, J., in *Re Liverpool Household Stores* (1890) 59

L.J. Ch. 616 required gross negligence to be proved, holding that such abstention from action or such action as the Court would hold to be mischievous and reckless, involving want of bonâ fide or honesty, was necessary. Byrne, J., in *Watts v. Bucknall* (1902) 2 Ch. 628, (1903) 1 Ch. 766, says the standard is whether the director can say that he has been defrauded or deceived into giving his sanction to a document which was not his. In *Broome v. Speak* (1903) 1 Ch. 586, affirmed, sub nom., *Shepherd v. Broome* (1904) A.C. 342 it was held that counsel's opinion was not sufficient to protect if the statement was in fact untrue and that honest though erroneous belief that the section did not apply to a particular contract of which the director knew is likewise ineffective.

The many decisions as to when directors are entitled to pay dividends shew the great difficulty of determining the true rule for ascertaining what is capital and what is income, and accentuate the extreme nicety required in fixing liability upon non-professional directors for acts into which actuarial calculations may enter.

An examination of the cases discussed in this article is most interesting as shewing the evolution of the principle that gross and culpable negligence in fact alone will render a director liable. Mistake, which renders a trustee liable, will not do. In business concerns much latitude must be given in the necessary subdivision of labour and responsibility. Where directors know of and take part in fraudulent acts they are liable and a like fate awaits those who refuse to give to their duties any care or judgment at all. This is gross negligence, but there must be proof of the absence of all attention before liability can attach. Speaking generally they lead to the result pointed out by Mr. Cook in his work on Corporations (section 703 note) where, in referring to the effect of the rules laid down by the Supreme Court of New York in *Bloom v. National United Co.* (1897) 152 N.Y. 114, he says that these rules very largely exempt directors of national banks from any liability whatever.

The question at the head of this article needs an answer. If the Courts in dealing with the question of the liability of directors has gone the length of practically absolving them, unless actually guilty of fraud or of such gross neglect as amounts to the same thing, is it not right that the office to which such small legal, and such large ostensible responsibility attaches should be abolished? It is not proper that such a condition of things should exist in any country where most of the business is done by limited liability companies without some effort to terminate it, by doing away with a name which is only a shadow and requiring corporations to be officered only by those who are in reality directors who direct.

FRANK E. HODGINS.

The recent decision of *Watt v. Watt* decided by the Supreme Court of British Columbia (noted post, p. 46) has caused some consternation in our western province. Doubtless legislation will be obtained as soon as possible to relieve those who have acted on the supposition that the Imperial Divorce and Matrimonial Causes Act is not in force in that province.

The Royal Arms have been recently placed over the Bench in the Courts of the Common Pleas and Chancery Divisions at Osgoode Hall, Toronto. These insignia of royalty serve to emphasize the fact that in the British Dominions the King is the fountain of justice, and that in his Superior Courts he is present in the person of his judges, to do justice not only between subject and subject, but also between subjects and the Crown itself. They also serve to emphasize the important principle involved in the words, "the King's peace," which forbids high and low, rich or poor, from taking the law into their own hands, and compels all alike to bow to the supremacy of the law as administered in the King's Courts. So long as we are true to the traditions of our forefathers these will be fundamental principles of law and liberty, and fittingly symbolized by the Royal Arms in our Courts of justice.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

MORTGAGE — VOLUNTARY ASSIGNMENT OF PART OF PROPERTY COVERED BY MORTGAGE—NO COVENANTS FOR TITLE—PARAMOUNT CHARGE—LIABILITY OF ASSIGNEE OF EQUITY TO CONTRIBUTE TO PAYMENT OF MORTGAGE DEBT—PAYMENT OF MORTGAGE DEBT BY EXECUTORS.

In re Darby, Rendall v. Darby (1907) 2 Ch. 465. A husband deposited with a bank by way equitable mortgage the title deeds of certain leasehold property together with a policy of life assurance and some dock warrants, as security for a debt. He subsequently by voluntary deed assigned the leasehold to his wife. The deed contained no reference to the equitable mortgage nor any covenant, express or implied, for title. On the death of the husband his executors paid off the mortgage and they claimed that they were entitled to claim contribution from the wife as assignee of the leasehold, but Warrington, J., considered that the husband having himself created the charge it was not, therefore, paramount to his own title, and the widow as assignee of leaseholds was under no liability to contribute to its payment, because the debt was the mortgagors' own, for which his estate was primarily and solely liable.

ANCIENT LIGHTS—ALTERATION OF BUILDING—NEW WINDOW RECEIVING SAME LIGHT AS OLD—ALTERATIONS MADE DURING PERIOD OF ACQUISITION OF RIGHT.

Andrews v. Waite (1907) 2 Ch. 500 was an action to restrain interference with the plaintiff's ancient lights. The lights in question had been acquired by user under the statute for upwards of twenty years. Pending the acquisition of the right the plaintiff's premises had been altered, and the original position of the windows changed, the wall having been torn down and re-erected nearer the defendant's buildings and the windows placed on a different level from that which they originally occupied, but as the judge found on the evidence the windows in their altered position still received the same or a portion of the same light as would have passed through the windows in their original position. These alterations, Neville, J., held had not the effect of preventing the acquisition of the right

to light, and, the defendant's erection being found to be a nuisance and obstruction of the plaintiff's lights, a mandatory order for its removal so far as it interfered with the light was granted.

COMPANY—DEBENTURE HOLDER'S ACTION—RECEIVER—DEBTS INCURRED BY RECEIVER AND MANAGER WITHOUT AUTHORITY—BANKRUPTCY OF RECEIVER—INSUFFICIENT ESTATE—COSTS—PRIORITIES.

In re London United Breweries, Smith v. London United Breweries (1907) 2 Ch. 511. This was a debenture holder's action in which a receiver and manager had been appointed. In carrying on the business of the company the receiver, without the authority of the Court, incurred liabilities. He subsequently became bankrupt, leaving the liabilities so incurred unpaid. The estate of the company having been realized the trustee of the bankrupt receiver claimed that the funds in Court, less the costs of realization, should be paid to him to apply on the debts incurred by the bankrupt as receiver and manager. The debenture holders claimed that the residue after payment of costs should be divided amongst the debenture holders. Neville, J., held that the funds in Court were applicable first in payment of the costs of realization, and secondly, in payment of the receiver's costs, and that the balance ought not to be paid to the trustee in bankruptcy, but that it should be distributed by the Court subject to an inquiry whether any and what debts outstanding had been properly incurred by the receiver in carrying on the business.

ANCIENT LIGHT — ENJOYMENT — "CONSENT OR AGREEMENT" — PRESCRIPTION ACT, 1832 (2 & 3 WM. IV. c. 71), ss. 3, 4—(R.S.O. c. 133, s. 35).

Hyman v. Van Den Bergh (1907) 2 Ch. 516 was also an action to restrain interference with the plaintiff's alleged ancient lights. It appeared that the plaintiff's lessee had in 1896 had nineteen years' possession of a certain cowshed having eight windows to which light came from over the defendant's premises; and that in that year the defendant placed an obstruction over the windows, the tenant removed the obstruction, and the windows remained unobstructed till 1898, when the defendant again obstructed them. The tenant again removed that obstruction, but being under the erroneous impression that he was not

entitled to an injunction to prevent the obstruction, the tenant sent to the defendant a letter agreeing to pay him a shilling a year for the lights. No answer was sent to the letter, but it was stamped as an agreement and the defendant relying on it refrained from re-erecting the obstruction. The promised shilling was never paid. In 1903 payment of arrears was demanded, but they were not paid. In 1906 the defendant having again obstructed the windows the present action was brought by the owner of the freehold of the dominant tenement, and Parker, J., held that it could not be maintained as the letter of 1898 was a "consent or agreement" within the meaning of the statute, 2 & 3 Wm. IV. c. 71, s. 3, (R.S.O. c. 133, s. 35), and consequently that there had not been an uninterrupted user for twenty years before action without such consent or agreement; and the agreement, though signed by only one of the parties, and he merely the lessee of the dominant tenement, was held to be a sufficient agreement within the statute.

STATUTE OF LIMITATIONS—MORTGAGE—EXTINGUISHMENT OF TITLE OF SECOND MORTGAGEE—PRIOR MORTGAGEE IN POSSESSION—REAL PROPERTY LIMITATION ACT, 1833 (3 & 4 Wm. IV. c. 27), s. 2—REAL PROPERTY LIMITATION ACT, 1874 (37-38 VICT. c. 57), ss. 1, 2—(R.S.O. c. 133, s. 23).

In *Johnson v. Brock* (1907) 2 Ch. 533, Parker, J., has decided that a second mortgagee may be barred under the Statute of Limitations (see R.S.O. c. 133, s. 23), as against his mortgagor after the lapse of the statutory period before action, in the absence of payment or acknowledgment by the mortgagor, notwithstanding that during such period a prior mortgagee may have been in possession of the mortgaged property.

CONTRACT—ACTION OF DECEIT—FRAUDULENT REPRESENTATIONS BY AGENT—PRINCIPAL AND AGENT—LIABILITY OF PRINCIPAL FOR FRAUD OF AGENT—PUBLIC AUTHORITIES PROTECTION ACT, 1893 (56-57 VICT. c. 61), s. 1—(R.S.O. c. 88, s. 1).

Pearson v. Dublin (1907) A.C. 351 is an important decision of the House of Lords (Lord Loreburn, L.C., and Lords Halsbury, Ashbourne, Macnaghten, James, Robertson, Atkinson and Collins), in which they have reversed the decision of the Lord Chief Baron of Ireland, and the Irish Court of Appeal. The action was for deceit and was brought in the following circum-

stances. The defendants, the corporation of Dublin, invited tenders for certain harbour works. The plans and specifications prepared by the defendants' engineer contained a representation as to the existence of a certain wall at a certain depth below the surface, and the plaintiffs tendered on the faith that such representation was true. The contract subsequently entered into by the plaintiffs provided that they were to verify all representations for themselves as to the levels and nature of all existing works and other things connected with the contract works. At the trial of the action the plaintiffs adduced evidence which their Lordships held was *prima facie* sufficient to submit to a jury, to the effect that the representations as to the work in question had been made by the defendants' agents fraudulently and without any reasonable ground for believing them to be true, and for the purpose of inducing low tenders to be made for the work required to be done. The learned Chief Baron, who tried the action, though agreeing to that view, nevertheless thought that the clause in the contract requiring the plaintiffs to verify for themselves all representations, exonerated the defendants from liability for erroneous statements however made, and he therefore withdrew the case from the jury and nonsuited the plaintiffs, and his judgment was affirmed by the Irish Court of Appeal. The House of Lords, however, took the wider and juster view that the clause in the contract only protected the defendants from liability for erroneous statements made honestly and in good faith and did not relieve them from liability for deceit where they or their agents had made fraudulent representations. All the Courts agreed that the Public Authorities Protection Act (see R.S.O. c. 88, s. 1) did not apply to such a case, as the act complained of was not done in the exercise of any public duty.

PATENT—AMBIGUOUS DESCRIPTION OF LAND—USER—EVIDENCE.

Attorney-General v. Vandeleur (1907) A.C. 369 may be briefly referred as throwing light on the effect of ambiguous words in a Crown patent. The Attorney-General for Ireland claimed on behalf of the Crown to be entitled to the merchants' quay at Kilrush. The defendant claimed under a Crown grant made in 1621. Admittedly the land adjacent to this foreshore was included in the grant, it did not in terms include it, but the language used may or may not have included it. In these circumstances the House of Lords (Lord Loreburn, L.C., and Lords

James and Collins) held that evidence as to user might be legitimately adduced to solve its meaning, and it appearing by the evidence that the defendant and his predecessors in title had had possession of the land and had erected the quay in question between fifty and sixty years ago; that it had originally been commenced by the Crown as a public work, but that the work had been subsequently abandoned by the Crown, and the defendant had repaid to the Crown all its expenditure and had himself proceeded and completed the quay at his own expense; it was therefore held that the grant in question ought to be construed as covering the locus in quo.

SHIP—SEAMAN—CONTRACT FOR SERVICE FOR ORDINARY VOYAGE—
CARRIAGE OF CONTRABAND—REFUSAL TO PROCEED TO BELLIGER-
ENT PORT—WAGES.

Palace Shipping Co. v. Caine (1907) A.C. 386 is the case known as *Caine v. Palace Steam Shipping Co.* (1907) 1 K.B. 670 (noted ante, vol. 43, p. 402, under the erroneous name of *Carrie v. Palace Steam Shipping Co.*). The House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, James, Robertson and Atkinson) have affirmed the decision of the Court of Appeal, that a seaman contracting for an ordinary voyage cannot be compelled to proceed to a belligerent port in a ship carrying contraband of war, but is entitled to claim his discharge and wages up to the final adjudication of his claim. Lord Atkinson differed as to the amount recoverable.

RAILWAY COMPANY—OMNIBUS BUSINESS—INCIDENTAL POWERS—
ULTRA VIRES.

In *Attorney-General v. Mersey Ry. Co.* (1907) A.C. 415 the House of Lords (Lord Loreburn, L.C., and Lords Ashbourne, Macnaghten, James and Atkinson) have reversed the decision of the Court of Appeal (1907) 1 Ch. 81. The action was in the nature of an information on the part of the Crown to restrain the defendant company from carrying on as incidental to their railway business, the business of carrying passengers by omnibuses. Warrington, J. (1906) 1 Ch. 811 (noted ante, vol. 42, p. 561), decided that it was ultra vires of the company to carry on an omnibus business. The Court of Appeal, however, dissolved the injunction upon the defendants undertaking not to carry by their omnibuses any persons who were not intending

passengers on their railway, but the House of Lord holds that such an undertaking is impracticable and restored the judgment of Warrington, J.

LIGHT—PRESCRIPTION—DOMINANT AND SERVIENT TENEMENT HELD BY DIFFERENT LESSEES UNDER SAME LANDLORD—PRESCRIPTION ACT, 1832 (2 & 3 WM. IV. c. 71), s. 3—(R.S.O. c. 133, ss. 35, 36).

In *Morgan v. Fear* (1907) A.C. 425 the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, James, Robertson, Atkinson and Collins) have unanimously affirmed the decision of the Court of Appeal (1906) 2 Ch. 406 (noted ante, vol. 43, 14). It may, therefore, be considered to be now settled law that one lessee may effectually acquire by prescription an easement of light as against another lessee of the same landlord. In Ontario, however, this only applies to the past, as since the 5th March, 1880, it has not been possible in this province to acquire by prescription an easement of light. See R.S.O. c. 133, s. 36.

TRADE NAME—INJUNCTION—SIMILARITY OF NAME.

The Dunlop Pneumatic Tyre Company v. Dunlop Motor Co. (1907) A.C. 430 seems somewhat to conflict with the case of *Fine Cotton Spinners v. Harwood* recently noted (see ante, p. 646). In this case two brothers under the style of R. & J. F. Dunlop carried on the business of selling and repairing bicycles, tricycles and motors. In 1904 the brothers registered a company called the Dunlop Motor Co., which company took over the business of R. & J. F. Dunlop and carried on a similar business to that previously carried on by that firm. The plaintiffs, who carried on a similar business, claimed that the name of the defendant company was an interference with their rights and they claimed an injunction against the use of the name of "The Dunlop Motor Co.," or any other name comprising the word "Dunlop," as being an infringement of the plaintiffs' trade name. The Scotch Court of Session on the evidence held that there was no proof that any one would be misled into thinking that the two companies were the same; and also that the plaintiffs had no exclusive right to the name of "Dunlop," which decision was affirmed by the House of Lords (Lord Loreburn, L.C., and Lords Robertson and Collins).

PROBATE DUTIES—SHARE OF DECEASED PARTNER—BUSINESS CARRIED ON IN A COLONY.

In *Commissioner of Stamp Duties v. Salting* (1907) A.C. 449, the Judicial Committee of the Privy Council (the Lord Chancellor and Lords Ashbourne and Macnaghten and Sir A. Wilson and Sir A. Wills) reversed the judgment of the Supreme Court of New South Wales. The question was whether the probate duties imposed by an Australian statute were payable in respect of the share of a deceased person in a business carried on by him in partnership in Australia, he having been domiciled and having died in England. The Colonial Court held that it was not, but the Judicial Committee decide that it was; that the liability of the estate to duty depends on its local situation and that the share of a deceased partner is situate where the business has been carried on at the time of his death.

STATUTORY POWERS—NEGLIGENCE IN EXERCISING STATUTORY POWERS—EVIDENCE.

Dumphy v. Montreal Light, H. & P. Co. (1907) A.C. 454 was an appeal from the Court of King's Bench of Quebec. The plaintiff's husband had been killed by reason of a derrick he was using having come in contact with an overhead electric wire of the defendants. The defendants were authorized by a Quebec statute in the alternative to carry their wires overhead or underground. The plaintiff claimed that they were guilty of negligence in not having put the wire which caused the accident underground; but the Judicial Committee of the Privy Council (Lords Robertson and Collins, and Wilson, Taschereau, and Wills, Knts.) agreed with the Quebec Court that the defendants were not guilty of negligence in adopting one of the alternatives authorized by the statute. The Judicial Committee also held that the defendants' omission to insulate or guard the wire in question could not be regarded as negligence on their part in the absence of evidence that such precaution would have been effectual to avert the accident.

PATENT—APPLICATION TO EXTEND PATENT—NON-COMPLIANCE WITH STATUTORY CONDITIONS—DISPENSING WITH STATUTE.

In re Frieze-Green's Patent (1907) A.C. 460. An application was made to extend a patent of invention under the Patents Act, 1883. The statute prescribed, as a preliminary to such

applications, that advertisements shall be published. The applicant had inadvertently omitted to advertise. The Judicial Committee decided that it had no power to dispense with the express provisions of a statute, and refused the application.

SPECIAL LEAVE TO APPEAL—COLONIAL STATUTE.

In *Tilonko v. Attorney-General* (1907) A.C. 461 an application was made to the Judicial Committee of the Privy Council for special leave to appeal from a decision of the Supreme Court of Natal. But it appearing that the question sought to be raised on the appeal had been settled by a colonial statute, the application was refused, it not being considered within the province of the Board to discuss or consider the policy, expediency or wisdom of a statute, or to do anything beyond deciding whether the Act applies.

BRITISH COLUMBIA—POWERS OF LOCAL LEGISLATURE—VANCOUVER ISLAND SETTLERS' RIGHTS ACT, 1904 — CONSTRUCTION—B.N.A. ACT, s. 92(10).

McGregor v. Esquimalt & Nanaimo Ry. (1907) A.C. 462 strikes us as a somewhat peculiar case. The facts appear to be as follows. By an Act of the Legislature of B.C., 47 Vict. c. 14, the lands in question, with other lands, were vested in the Dominion Government for the purpose of being granted to the defendant railway as an aid to its construction. At that time there were settlers on this railway belt of whom the appellant was one, no provision appears to have been made protecting their rights. The Dominion Government granted the lands in question with others to the respondents as intended on 21st April, 1887. In 1904 the Legislature of British Columbia passed the Vancouver Island Settlers' Rights Act, whereby it was provided that those settlers within the railway belt prior to the Act 47 Vict. c. 14, should be entitled to grants in fee simple of the lots of which they were in possession, and under this latter Act a grant of the lot in question was made to the appellant. It seems to have been conceded that the appellant was entitled under this grant to the surface rights of the lot, but the respondents claimed that they were entitled to all mines and minerals on the lot. The patent issued under the Act of 1904 contained no reservation of mines and minerals. Martin, J., who tried the action held that the Act of 1904 was within the powers of the local

Legislature as being in relation to property and civil rights within the meaning of B.N.A. Act, s. 92(13), and the grant made thereunder was valid. The Supreme Court of British Columbia, however, reversed his decision, considering the Act of 1904 ineffectual to divest the rights of the respondents under the grant from the Dominion Government. The Judicial Committee (the Lord Chancellor, Lords Halsbury, Ashbourne, Macnaghten, and Collins, and Wilson and Wills, Knts.) have reversed the decision of the Supreme Court of British Columbia and hold the Act of 1904 to be *intra vires*; and the respondents' railway as being a purely local undertaking within the jurisdiction of the local Legislature under B.N.A. Act, s. 92 (10). The result seems to be that land granted by the Crown as a subsidy to a railway undertaking, may afterwards be taken away from the railway and given to someone else by a subsequent statute. The only justification for such a course, however, would appear to be the fact, as in the present case, that the subsequent grantee had at the time of the prior grant some equitable claim to the land in question which had not been protected. One would imagine, however, that in such circumstances the railway, thus deprived, would have an equitable claim to compensation against the Crown.

ELECTRIC LIGHT — STATUTE — CONSTRUCTION — PREFERENCE —
EQUALITY.

Attorney-General v. Melbourne (1907) A.C. 469. This was an appeal from the High Court of Australia. By an Australian statute the respondents were empowered to supply electricity within the City of Melbourne. The Act provided that every person within the area of the city should be entitled to a supply on equal terms and that no preference should be given to any person. The respondents gave customers an option to take electricity under two different systems of charge—one at a fixed rate and the other at a rate varying with the amount consumed. The High Court held that this was not a contravention of the provisions above referred to, and the Judicial Committee of the Privy Council (the Lord Chancellor, and Lords Macnaghten, Atkinson and Collins, and Sir A. Wilson) affirmed their decision. The preference prohibited being as between customers dealing under the same system and not as between customers dealing under different systems.

CONTRACT—LESSOR AND LESSEE—IMPLIED OBLIGATIONS AS TO QUIET
ENJOYMENT—INTENTION OF PARTIES—NOISE AND VIBRATION—
INJUNCTION.

Lyttleton Times v. Warners (1907) A.C. 476 was an action by lessees against their lessors for an injunction to enforce an implied covenant for quiet enjoyment of the demised premises. The facts were, that the defendants owned a printing establishment adjoining hotel premises occupied by the plaintiffs and it was agreed that the defendants should reconstruct their premises so as to provide rooms above their printing office which could be used as bed rooms for the plaintiffs' hotel, of which rooms they were to become lessees. The premises were accordingly reconstructed and the rooms above leased to the plaintiffs, but it was found that the enjoyment thereof was disturbed by the noise and vibration consequent on carrying on the printing business below them. The plaintiffs claimed an injunction against the working of the defendants' machinery between 9 p.m. and 8 a.m. The Court of Appeal for New Zealand decided in favour of the plaintiffs, the lessees; but the Judicial Committee of the Privy Council (the Lord Chancellor and Lords Robertson and Collins, and Sir F. North and Sir A. Wilson) reversed that decision, holding that the implied obligation for quiet enjoyment was controlled by the common intention of the parties that the defendants' printing business should continue to be carried on.

COVENANT TO PAY ANNUITY FOR WIFE'S SUPPORT—RESTRAINT
AGAINST ANTICIPATION—RIGHT TO ANNUL COVENANT ON
NOTICE TO TRUSTEE—WIFE'S WAIVER OF NOTICE.

Mcnaughten v. Paterson (1907) A.C. 483. This was an appeal from the High Court of Australia. By a separation deed made in 1894 a husband covenanted to pay an annuity to trustees for his wife's benefit without power of anticipation, but it was provided that if the husband gave notice to the trustees after the expiration of twelve months from the date of the deed, of his intention to pay a reduced amount, in such case, unless all parties agreed as to the reduced amount to be paid, all covenants in the deed should be null and void. Before the expiration of the twelve months the husband notified the wife's solicitors of his intention to pay a reduced amount, and the wife instructed her solicitors to waive the stipulated notice to the trustees. No agreement appeared to have been made as to the reduced

amount to be paid, but in 1904 the trustees brought the present action claiming arrears under the covenant as a still subsisting covenant. The High Court held that the action was not maintainable, and that the wife's waiver of the notice to the trustees was sufficient; and on the true construction of the restraint clause, that applied to the annuity so long as it was payable, but not to the notice as contended by the appellant. The Judicial Committee (The Lord Chancellor and Lords Ashbourne and Macnaghten and Sir A. Wilson and Sir A. Wills) affirmed the decision.

WILL—ALTERNATIVE ABSOLUTE GIFTS—CONSTRUCTION.

McCormick v. Simpson (1907) A.C. 494, though a Quebec case, involves a point of general interest. A testator by his will devised land to his widow for life after her death to his eldest son John for life, and "thereafter to become the absolute property of John's eldest son," and alternatively "to become the property of my son James or of his eldest son," and failing either of them to the appellant. John died in the testator's lifetime without male issue. James and his son, who predeceased him, survived the widow. The question was, what estate James took. The Judicial Committee of the Privy Council (Lords Robertson and Collins, and Sir A. Wilson, Sir H. Taschereau and Sir A. Wills) agreed with the Quebec Court of King's Bench, that the gift to John's eldest son being an absolute interest, the alternative gift to James and his son must in the absence of words importing a different intention be construed as also absolute, and the gift over in the case of the death of James without male issue was defeated if either James or his son lived to take absolutely.

CANADA TEMPERANCE ACT, 1888 (51 VICT. C. 34), s. 10—SEARCH WARRANT BEFORE PROSECUTION.

In *Townsend v. Cox* (1907) A.C. 514 the Judicial Committee of the Privy Council affirmed the judgment of the Supreme Court of Nova Scotia, holding that under the Canada Temperance Act, 1888, it is competent to issue a search warrant without previously instituting a prosecution for breach of the Act.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.]

[Oct. 17, 1907.]

MONTREAL LIGHT, HEAT & POWER CO. v. LAURENCE.

Negligence—Electric lighting—Dangerous currents—Trespass—Breach of contract—Surreptitious installations—Liability for damages.

P. obtained electric lighting service for his dwelling only, and signed a contract with the company whereby he agreed to use the supply for that purpose only, to make no new connections without permission, and to provide and maintain the house-wiring and appliances "in efficient condition, with proper protective devices, the whole according to Fire Underwriters' requirements." He surreptitiously connected wires with the house-wiring and carried the current into an adjacent building for the purpose of lighting other premises by means of a portable electric lamp. On one occasion, while attempting to use this portable lamp, he sustained an electric shock which caused his death. In an action by his widow to recover damages from the company for negligently allowing dangerous currents of electricity to escape from a defective transformer through which the current was passed into the dwelling.

Held, reversing the judgment appealed from, that there was no duty owing by the company towards deceased in respect of the installation so made by him without their knowledge and in breach of his contract and that, as the accident occurred through contact with the wiring which he had so connected without their permission, the company could not be held liable in damages.

Appeal allowed with costs.

Archer, K.C., and G. H. Montgomery, for appellants. *Henry J. Elliott and H. R. Bisailon*, for respondent.

Province of Ontario.

COURT OF APPEAL.

Court of Appeal.]

RE GIBSON.

[Oct. 4, 1907.]

*Lunatic—Detention in asylum—Informalities in certificate—
Habeas corpus—Application for discharge under—Affidavit
shewing it to be dangerous for alleged lunatic to be at large
—Direction of trial of issue as to sanity.*

Where the discharge of a person detained in a lunatic asylum as a lunatic was moved for under a writ of habeas corpus, by reason of alleged informalities in the certificate, on which the alleged lunatic had been admitted; but it appearing from the affidavit filed by the superintendent and others in the asylum that it would be dangerous to allow him to be at large, the Court directed the trial of an issue as to his sanity: the application for the discharge to stand over, pending the result of the issue or other order of the Court.

Re Shuttleworth (1846) 2 Q.B. 651, approved.

Judgment of TEETZEL, J., vared.

J. W. McCullough, for the appellant. J. R. Cartwright, K.C., for the respondent.

Court of Appeal.]

IREDALE v. LOUDON.

[Nov. 2, 1907.]

*Limitation of actions—Possession—Exclusive prescription—
Adverse possession of a portion of a building.*

Appeal from judgment in this case reported 14 O.L.R. 17, allowed, and action dismissed and counter-claim allowed with costs. It is very doubtful if the Statute of Limitations is applicable to possession of an upper room or flat in a building, but at any rate the plaintiff is not entitled to annex to what he may acquire by force of the statute any further right or implied obligation of support; and it is doubtful if he can acquire easement of support even by a possession of twenty years.

W. D. McPherson, for defendant, appellant. Tilley and Parmenter, for plaintiff.

Full Court.]

REX v. SUNFIELD.

[Dec. 7, 1907.

Criminal law—Evidence—Dying declaration—Threats—Improper admission of evidence—No substantial wrong or miscarriage—Criminal Code, s. 1019.

Upon the trial of the prisoner for the murder of a foreigner, the evidence shewed that the deceased was found lying on the floor of a bedroom in his house. He was lifted up and laid upon the bed, when it appeared that he had received a wound from a pistol bullet, and it was subsequently shewn that this wound was the cause of his death. A man testified that shortly afterwards he entered the room and asked the deceased, "Who cut you," to which the deceased answered, "No cut, Jake shoot." The witness then said to the deceased that he would send for a doctor, and the deceased answered, "No doctor, Billy, me die."

Held, that the statement of the deceased "Jake shoot," that is, that the prisoner shot him, as related by the witness, was properly received in evidence as a dying declaration, the words "No doctor, me die," being sufficient to shew that the deceased spoke under a belief without hope that he was about to die from the wound that had been inflicted upon him; and it made no difference that the words incriminating the prisoner preceded the words shewing the expectation of death.

Held, also, that there was no reason for excluding testimony proving quarrels between the deceased and the prisoner and threats made by the latter.

Evidence of threats made by the prisoner to another person was improperly admitted, but, in the circumstances, no substantial wrong or miscarriage of justice was occasioned on the trial by reason of the evidence, and therefore, under s. 1019 of the Criminal Code, the conviction should not be set aside or a new trial directed.

J. G. Farmer and *J. L. Counsell*, for prisoner. *J. R. Cartwright*, K.C., for Crown.

Full Court.]

REX v. LEE GUEY.

[Dec. 13, 1907.

Criminal law—Keeping common gaming house—Summary trial—Police magistrate—Right of accused to elect to be tried by jury—Criminal Code, ss. 773, 774.

A police magistrate has not absolute and summary jurisdiction under ss. 773 and 774 of the Criminal Code to try, without

their consent, persons accused of keeping a common gaming house; such persons have the right to elect to be tried by a jury; the words "disorderly house" in s. 773 do not include "common gaming house," but are limited by the words which immediately follow them, "house of ill fame or bawdy house." *The Queen v. France* (1898) 1 Can. Crim. Cas. 32 approved and followed.

The accused having been illegally tried and convicted before a magistrate, their conviction was quashed, and it was directed that they should be accorded the right of election to be tried by or without a jury, and that they should be tried accordingly.

A. M. Lewis, for the accused. Cartwright, K.C., for the Crown.

HIGH COURT OF JUSTICE.

Divisional Court.] McCANN v. MARTIN. [Oct. 30, 1907.

Chattel mortgage—Renewal—Time of filing—Computation of time.

A chattel mortgage filed on April 26th, 1904, at the hour of 10 a.m. is renewed within time if the renewal be filed on April 26th, 1905, at the hour of 10 a.m.

W. R. Smyth, for plaintiff, appellant.

Divisional Court, Q.B.D.] [Nov. 5, 1907.

REX v. LOWERY.

Habeas corpus—Discharge of prisoner—Condition of not bringing action being against magistrate.

Where a prisoner is entitled to his discharge, under habeas corpus, by reason of no offence being disclosed in the papers under which he was committed, such discharge cannot be made conditional on no action being brought against the magistrate, or other person in respect of the conviction, or anything done thereunder.

D. O. Cameron, for prisoner. Cartwright, K.C., for Crown.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [Nov. 12, 1907.

BELLEVILLE BRIDGE CO. v. TOWNSHIP OF AMELIASBURG.

Assessment—Toll bridge over navigable waters—Liability to assessment—Real property—Easement—Exemptions—Interest of Crown—Bridge forming part of toll road—Public road or way.

A toll bridge across the waters of the Bay of Quinté, and its approaches, erected by a company incorporated by 50 & 51 Vict. c. 97 (D.), and acquired by the plaintiffs, who were incorporated by 62 & 63 Vict. c. 95 (D.), was held to be liable to assessment, as regards the part situate in the township of Ameliasburg, as real property, within the meaning of the Ontario Assessment Act, 4 Edw. VII. c. 23.

The effect of the two Dominion statutes referred to is to confer a perpetual right in the nature of an easement to construct and maintain the bridge across the navigable waters of the Bay of Quinté; the words "real property," in s. 2 (7), of the Assessment Act, by virtue of s. 2 (8), of the Municipal Act, 1903, include an easement; and the bridge comes within none of the exemptions mentioned in the Assessment Act. The interest of the Crown, liable under the general words of the statute; and the plaintiffs were not agents or trustees for the Crown. Sec. 37 of the Act applies only to a bridge forming part of a toll road, and not to this bridge; nor is this bridge a public road or way, within the meaning of s. 5 (5) of the Assessment Act.

Niagara Falls Suspension Bridge Co. v. Gardner (1869) 29 U.C.R. 94; *In re Queenston Heights Bridge Assessment* (1901) 1 O.L.R. 114, and *International Bridge Co. v. Village of Bridgeburg* (1906) 12 O.L.R. 314 followed.

Judgment of BOYD, C., affirmed.

E. G. Porter, for plaintiffs. *W. S. Morden*, for defendants.

Divisional Court, Ch.D.]

[Nov. 18, 1907.

REX v. BRISBOIS.

Liquor License Act—Selling liquor without a license—Absence of evidence to shew sale by defendant.

Where defendant was convicted and imprisoned for the sale of liquor without a license, but the evidence returned in re-

sponse to certiorari issued in aid of a writ of habeas corpus, while disclosing a sale on the premises, failed to shew a sale by the defendant himself the conviction and imprisonment of the defendant was held to be illegal and an order made for his discharge from custody.

J. B. MacKenzie, for defendant. *Cartwright*, K.C., for Crown and convicting magistrate.

Divisional Court, Ch.D.]

[Nov. 18, 1907.]

LAWSON v. CRAWFORD.

Injunction—Interim—Primâ facie case disclosed—Subsequent displacement.

Sub-section 9 of section 58 of the O. J. Act, R.S.O. 1897, c. 51, does not give any new right to claim an injunction, or extend the jurisdiction of the Court, or alter the principles upon which it gives summary relief by interlocutory injunction.

S. R. Clarke, for defendant. *Watson*, K.C., for plaintiff.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.]

[Dec. 9, 1907.]

BRYANS v. MOFFATT.

Jury notice—Striking out—Discretion exercised before trial—Equitable defence.

The discretion of a judge in Chambers in striking out a jury notice, in an action to be tried outside of Toronto, was held to have been properly exercised where the action was brought by the executors of a deceased mortgagee upon the covenant contained in the mortgage deed, and the defence was that the written documents, the mortgage deed and the deed of conveyance to the mortgagors, did not express the true agreement between the parties.

Semble, per MEREDITH, C.J.C.P., that the rule laid down in *Montgomery v. Ryan* (1906) 13 O.L.R. 397 might well be extended to all cases, whether to be tried in Toronto or elsewhere.

Semble, also, that the facts alleged in the defence would not

have been admissible under the plea of non est factum; that the defence was really an equitable one, involving rectification of the instrument sued upon; and in that case the jury notice would be irregular.

Order of Boyd, C., affirmed.

H. E. Rose, for defendants. *A. C. Macdonell*, for plaintiffs.

Boyd, C.]

T.— v. B.—.

[Dec. 10, 1907.]

Marriage—Declaration of nullity—Impotence—Jurisdiction.

The High Court of Justice has no jurisdiction to entertain an action to have a marriage declared null and void by reason of the alleged incapacity and impotence of one of the parties.

Lawless v. Chamberlain (1899) 18 O.R. 296 distinguished.

C. W. Thompson, for plaintiff. *H. W. Mickle*, for defendant.

Province of Nova Scotia.

SUPREME COURT.

Longley, J.]

ROBINSON v. McNEIL.

[Nov. 14.]

Gaming debt—Action for money borrowed to pay—Notice of assignment of debt—Immaterial slip—Code s. 226—Statute 9 Anne.

Defendant was a participant in several games of poker at hotels in the City of H., and being a loser and unable to pay, borrowed money for that purpose from L. and A. giving his cheques therefor. The cheques were dishonoured at the bank, and in the case of A., a promissory note was given for the amount, which was also dishonoured at maturity. The claims were assigned to plaintiff who brought action to recover the amount.

Held, 1. Notice of the assignment, signed by plaintiff "by his attorneys," was sufficient.

2. The notice setting forth the assignment accurately, a slip made in post-dating the notice was immaterial.

3. In the absence of evidence to shew that the proprietors of the hotels had any interest in the game or derived profit therefrom or had knowledge that it was going on, the hotel was not "a house, room or place kept for gain to which persons resort for the purpose of playing at any game of chance or at any mixed game of chance and skill" within the meaning of the Criminal Code, s. 226, (R.S.C. vol. 3, c. 146).

4. Assuming the statute 9 Anne to be in force in Nova Scotia (as to which quære) the money advanced by L. and A. at the request of defendant for the purpose of enabling him to pay his losses, was not a gaming debt within the meaning of the statute, but was recoverable at common law.

W. B. A. Ritchie, K.C., and Mellish, K.C., for plaintiff. A. A. Mackay, and J. M. Chisholm, for defendant.

Full Bench.]

THE KING v. BARNES.

[Nov. 23, 1907.

Crown case—Matter touching regularity of trial—Power of judge to reserve case.

Defendant was indicted and tried for the offence of rape committed upon the person of a girl a few weeks over the age of 14 years. The jury found him guilty with a recommendation to mercy and he was sentenced to be committed to jail for the term of one year. The prisoner before sentence moved for a reserved case upon the affidavits of his solicitor and two of the jurymen to the effect that while the jury were engaged in deliberating upon the case the sheriff of the county, who had been called into the juryroom, made a statement giving them to understand that if they found the prisoner guilty and recommended him to mercy the judge would impose a light sentence. The trial judge reserved a case for the opinion of the Court finding that the statement alleged was calculated to influence the jury in finding the verdict which they did. On argument the preliminary objection was taken that the judge had no right or authority to enter upon or conduct an enquiry into any matter of fact touching the regularity of the trial, which had been concluded, and that the enquiry made by him and his finding of fact touching the alleged acts of the sheriff were without warrant in law and that no case could be reserved or stated in connection with such enquiry.

Held, that the point was well taken.

RUSSELL, J. (dubitante), dissented in order to enable an appeal to be taken.

Roscoe, K.C., for prisoner. Cluney, for Crown.

Full Bench.] THE KING v. SAM CHAK. [Nov. 30, 1907.

Chinese Immigration Act—Non-payment of duty—Not a criminal offence—Connection set aside.

Defendant was tried and convicted before a County Court judge for violating the provisions of R.S.C. c. 95, ss. 7, 30, in that the being a person of Chinese origin did enter Canada without paying the tax required by s. 7 of the said Act. The learned judge reserved several questions for the opinion of the Court including the following: "Does the accusation sufficiently charge the defendant with an indictable offence under ss. 7 and 30 of c. 95 of the Revised Statutes of Canada, 1906."

Held, that while the statute imposes a tax upon persons of Chinese origin entering Canada, with certain exceptions, and provides machinery for the collection of the tax, it does not make the entering Canada by such persons without payment of the tax a criminal offence, and that the defendant not being charged with any criminal offence his conviction was unwarranted and must be set aside and that he was entitled to his discharge.

DRYSDALE, J., dissented.

Power, K.C., and F. McDonald, for prisoner. Smith, for the Crown.

Full Bench.] CRAIG v. THOMPSON. [Nov. 30, 1907.

Champerty and maintenance—Agreement to assist party to action—Consideration.

Plaintiff who had been a shareholder and secretary of a mining company for a number of years, and had charge of its books and an intimate knowledge of its affairs, entered into an agreement in writing with defendant, the principal shareholder in the company, to give him certain assistance for the purpose of enabling him to win a suit then pending between defendant and another shareholder in relation to an option upon an adjoining

property originally held by the company, but which defendant had had transferred to himself. In consideration of the proposed assistance, defendant agreed to pay plaintiff a sum of money in cash in the event of his winning the suit and a further sum when a sale of the property was effected.

At the time of the agreement plaintiff had ceased to be a shareholder and had been paid his salary as secretary and no interest either legal or equitable was shewn to justify his interference in the litigation.

Held, allowing defendant's appeal with costs, that the contract was illegal on the ground of maintenance and that plaintiff could not recover.

W. B. A. Ritchie, K.C., for appellant. *Mellish*, K.C., for respondent.

Full Court.]

RAFUSE v. ERNST.

[Nov. 30.

Appeal—Issues of fact—Refusal to disturb findings.

Where the matters in issue between the parties, plaintiff and defendant were entirely matters of fact, the evidence was very contradictory, and the trial judge accepted as true the version of the plaintiff and his witnesses as being the more consonant with reason and the probabilities of the mode of dealing between the parties, the Court refused to disturb the findings and dismisses defendant's appeal with costs.

McLean, K.C., for appellant. *Paton*, for respondent.

Province of Manitoba.

COURT OF APPEAL.

Full Court.]

RE HARVIE.

[Nov. 25, 1907.

Will—Attestation by witnesses—Affidavit of execution substituted for ordinary attestation clause.

At the execution of the last will of the deceased in Portland, Oregon, the attorney substituted a formal affidavit of execu-

tion at the foot of the will and below the signature of the testatrix for the usual attestation clause. This affidavit extended over part of another page but was signed by the witnesses in the presence of the testatrix and then sworn to by them. Their evidence shewed that they intended to and did witness the will and also intended to subscribe it as witnesses.

Held, that s. 5 of The Wills Act, R.S.M. 1902, had been sufficiently complied with and that the will had been validly executed. *Griffiths v. Griffiths*, L.R. 2 P. & D. 300, followed.

McLeod, for applicant. *Haggart*, K.C., for contesting parties.

KING'S BENCH.

Macdonald, J.]

CATTU *v.* OSBORNE.

[Nov. 19, 1907.]

Contempt of Court—Release on payment of costs—Purging contempt.

Application for the release of the defendant Litster who had been committed to jail under an attachment for contempt of Court in not producing a certain minute book which he had been ordered to produce. The prisoner swore that he had left the book at the hall of the union and had not since been able to find it. His mother swore that she had burned a minute book, her son having told her there was trouble over it, thinking that, if the cause of the trouble were removed, the trouble itself would cease, and that her son knew nothing about her having destroyed it.

The learned judge was not satisfied that the book burned by the mother was the book the prisoner had been required to produce and believed that the latter had been put out of the way by members of the executive of the union or through their connivance, but that it was now out of the power of the prisoner to produce it.

Held, that the prisoner had not purged his contempt, and should only be released on payment of all costs occasioned by his misconduct in connection with the lost book, unless it were shewn that such costs could not be paid by reason of poverty. *In re M.*, 46 L.J. Ch. 24, followed. *Monkman v. Sinnott*, 3 M.R. 170, distinguished.

Knott, for prisoner. *O'Connor* and *Blackwood*, for plaintiffs.

Province of British Columbia.

SUPREME COURT.

Clement, J.]

WATT v. WATT.

[Nov. 10, 1907.

Divorce—Stare decisis—Divorce and Matrimonial Causes Act, 1857 (Imp.), how far in force in British Columbia—Jurisdiction of Supreme Court to grant decree of divorce a vinculo.

The Divorce and Matrimonial Causes Act, 1857 (Imp.), is not in force in British Columbia and the Supreme Court has no jurisdiction to grant a divorce a vinculo.

The decision in *S. v. S.* (1877) 1 B.C. (Pt. 1) 25, not being the decision of an appellate tribunal, nor of the Full Court sitting in banc, is not technically binding on the Court even when constituted of a single judge. The view of Begbie, C.J., in *S. v. S.*, adopted in preference to that of the other two judges (Crease and Gray, JJ.). That in the circumstances the rule stare decisis could not apply more particularly as the question is one of jurisdiction.

Seemle. If the Court has jurisdiction it may be exercised by a single judge sitting as the Court.

Wilson, K.C., for the Attorney-General. *J. A. Russell*, for petitioner. *Woodworth*, for respondent.

Full Court.]

BAGSHAWE v. ROWLAND.

[Nov. 28, 1907.

Principal and agent—Sale of land—Commission for securing purchaser, able and willing to purchase.

In order to earn his commission, the agent must produce to the vendor a party able, ready and willing to purchase on the terms given to the agent by the vendor, and if the transaction is prevented from becoming a binding contract only through the fault or default of the vendor, the agent does not thereby become disentitled.

Dictum of Lord Esher, M.R. in *Grogan v. Smith* (1890) 7 T. L. R. 132 followed.

A. E. McPhillips, K.C., for appellant, defendant. *W. J. Taylor*, K.C., for respondent, plaintiff.

Book Reviews.

Negligence in Law. Third edition. (Canadian edition.) By THOMAS BEVEN, of the Inner Temple, Barrister-at-law. London: Stevens & Haynes. Toronto: Canada Law Book Company, Limited, 1908.

The latest edition of Beven's great work on the law of Negligence, which has been in preparation for the last three or four years, has just issued from the press.

A special feature of this edition is that reference is made to all the important Canadian cases. The learned author has systematically gone through all our Reports, and they have been treated on the same footing as the English Reports. For example, *Blain v. Canadian Pacific Railway Co.*, 34 Can. S.C.R. 74, is cited and fully considered as to the extent of the duty of carriers to afford protection to passengers on their trains, and *Canada Woollen Mills v. Traplin*, 35 Can. S.C.R. 424, is cited as to a master's duty to his servant to prevent injury from defective appliances.

It also contains the more important American cases, which serve to illustrate not only the sharp differences which, on particular points, exist between English and American decisions, but also to shew that the broad, general principles of the law, as declared by the judges of both countries, are identical. In the author's own words, American cases must "always have a place in English treatises ambitious of excellence." Special reference is made to American authorities on points not covered by English decisions. Over 1,400 new cases have been cited and considered in this edition.

The fame and authority of Beven on the law of Negligence are such as to need no commendation. His masterly grasp and acute analysis of legal principles is not excelled by any jurist of our time. He is not content to be a mere compiler of cases and to state the law as the reports state it for him, but he has compared case with case, with a view to bringing out the principle involved, and has boldly criticised decisions which he deems to be fundamentally unsound.

The Criminal Code and the Law of Criminal Evidence. Second edition. By W. J. TREMEER, Barrister-at-law. Toronto: Canada Law Book Company, Limited, 1908.

Announcement is made that the second edition of this important work is in press, and will be issued shortly. A new edition is necessary by reason of the revision and re-arrangement of the Criminal Code, 1906, and because of the numerous cases that have been decided in the six years which have elapsed since the former edition.

Bench and Bar.

JUDICIAL APPOINTMENTS.

ALBERTA.

Roland Winter, of Calgary, Barrister, to be Judge of the District Court of Lethbridge. Arthur Allan Carpenter, of Innisfail, barrister, to be Judge of the District Court of McLeod. Joseph C. Noel, of Edmonton, barrister, to be Judge of the District Court of Wetaskiwin. Hedley Clarence Taylor, of Edmonton, barrister, to be Judge of the District Court of Edmonton. Charles Richmond Mitchell, of Medicine Hat, to be Judge of the District Court of Calgary. (Nov. 21, 1907.)

SASKATCHEWAN.

Reginald Rimmer, of Regina, barrister, to be Judge of the District Court of Cannington. Alexander Gray Farrell, of Moose Jaw, barrister, to be Judge of the District Court of Moosomin. Thomas Cranston Gordon, of Carnduff, to be Judge of the District Court of Yorkton. Frederick Fraser Forbes, of Regina, barrister, to be Judge of the District Court of Prince Albert. (Nov. 21, 1907.)

Plotsam and Jetsam.

An old farmer, eccentric, reputed to be rich, but who died penniless. His will was short, and in the words following: "The last will and testament of ——. There is only one thing I leave, I leave the earth—my relatives have always wanted that, they can have it."

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KING'S COUNSEL IN ONTARIO.

One of the responsibilities which Ministers of the Crown have to assume, is that of making recommendations to the Crown and its representative as to the bestowal of honours; and it is not too much to expect that the advisers of His Majesty, or of his representatives, in making recommendations for the bestowal of honours by the Crown, will take care that what is intended as a honour, and a public recognition of merit, shall not, by reason of its broadcast and indiscriminate distribution, cease to fulfil the sole purpose for which it exists.

To be named to be of counsel for His Majesty, either in the Dominion or Provincial Courts, ought to be no mean honour; and if due regard were to be had to the professional merits of those on whom the honour is conferred it would fulfil a perfectly legitimate object, and constitute a mark of professional distinction to which lawyers might reasonably aspire.

But if in making such appointments, professional standing is lost sight of by the advisers of the Crown, and the bestowal of what ought to be a mark of professional merit is made the vehicle of rewarding partisan services in the political arena, then, what ought to be an honourable distinction conferred for strictly professional merit ceases to be so, and an injustice is done, not only to the Crown, but also to the profession in thus prostituting its honours to alien purposes.

The list of those who have recently been appointed by the Government of Ontario as King's Counsel includes 188 members of the profession. A long and laboured semi-official memorandum is published accounting for, or rather excusing, this wholesale manufacture of "silk," and the proverb seems to apply—"Qui s'excuse, s'accuse."

It is needless to say that the announcement was received with

surprise by the profession in Ontario; firstly, because of the magnitude of the list, and secondly, because of some names being included which ought to have been omitted, and the marked absence of others which might reasonably be expected to have been included.

The memorandum, as well as the list itself, indicates that the foundation of the list is political. Former lists have been so framed for many years past. A few members of the profession who do not belong to the party in power have (as usual) been inserted to give the list a semblance of impartiality. We regret that the present Provincial Government should have followed the bad example set by its predecessors.

The list makes a total of 354 appointments since 1900; not speaking of those who had previously enjoyed the honour. As the making a barrister a K.C. is presumably a recognition of a distinguished position at the Bar, the public of Ontario will be gratified to learn what a very distinguished Bar it possesses.

We do not propose to criticise the list individually, but it may be said in general terms that, to some of those who have been appointed, that they should have been appointed long ago; they were left out of former lists, however, possibly for political reasons, as several have been left out on this occasion, whom the profession know to be more entitled to the distinction than the majority of those who have received it. A few more are certainly worthy recipients; others again can scarcely be said to practice at the Bar, being really solicitors, though nominally barristers, and some few can scarcely be said to do any legal business of any kind.

In fact, for those who care to study it, it is a Chinese puzzle to know how, on any ground of merit, or on what principle, if any, the list was made up. To illustrate:—The fact of a barrister having been elected a Benchers is *prima facie* evidence of his standing at the Bar. Now there were four Benchers who were not K.C.'s before this batch were appointed; but of these only two have been (and very properly so) given this right of precedence, the other two, equally eligible, being left at the outer

Bar. Again, the qualification of seniority seems to be of no account in this list—not that that in itself is a qualification—but some juniors in a firm are appointed over their seniors of at least equal capacity and standing. The key to the puzzle, if there is a key, must be party politics, and a most unpleasant and inappropriate one it is.

Long ago the profession had almost come to the conclusion that “silk” had ceased to be an honour, and this list confirms that conclusion. Those who are responsible for the appointments have again belittled what was, many years ago, regarded as a very honourable distinction. Better that the farce should cease and the position be abolished. To be made one of a herd of nobodies is no compliment to men of real merit, and it brings into ridicule those whom the whole profession know have received the honour for no other reason than political support of the party in power.

One of the appointees, we understand, has declined the honour, whether from motives of modesty or contempt we are unable to say. It is not very complimentary to the Crown when its honours are thus declined.

There is another cognate matter to which attention should be called. There are some gentlemen at the Bar who hold patents of the Dominion Government appointing them King's Counsel. One at least of these gentlemen, and there may be more, considers that this gives him no right to appear in silk in the Provincial Courts. The recent appointments by the Provincial Government do not, we believe, include any of these gentlemen, although some of them are eminently worthy of the distinction. It would seem odd to see, in an Ontario Court, well-recognized leaders of the Bar in “stuff” when some junior non-entity appears in silk and takes precedence. The question arises, ought the appointment by the Dominion Government of a gentleman as a K.C. to be regarded as a bar to his appointment as a K.C. by the Provincial Government. We should say it ought not, but we fear it is so considered, if this phase of the subject has been considered at all.

CHANGES IN RAILWAY LEGISLATION.

In the year 1906 when the general revision of the Canadian Statutes took place, numerous and drastic changes were made in the Railway Act of 1903; its sections were, to a very great extent, re-arranged and the phraseology and effect of them, in many instances, altered. It has, therefore, become apparent that a new annotated edition of MacMurchy & Denison's Railway Act, similar in form to the previous work, will soon be required.

The time, however, is scarcely ripe yet for bringing out a new edition, partly because of the existing agitation to increase the powers of the Board of Railway Commissioners, and partly because of proposals to make other general changes in the statutes. No legislation of this character has yet been passed, but already some bills have been introduced proposing to limit the rate of speed in cities and dealing with placing wires across the railway and with the law of expropriation.

The proposed increase in the powers of the Board of Railway Commissioners will, very likely, be of an important character, and the sections of the Act bearing upon this matter may be largely changed. This coupled with the fact that litigation is now pending which may have an important bearing upon some of the sections of the Railway Act of 1906 would make it difficult, if not impossible, to bring out a work at the present moment, which would have a permanent value.

It is, therefore, felt that the new edition should be postponed for a few months until the new legislation, which is to be passed, is made public, and until litigation now pending is decided, after which it will be possible to annotate the more important sections of the Act in the hope that railway legislation will retain its present form for some time to come.

Meanwhile in order to facilitate a reference to the sections of the earlier Act a table of the former legislation in the Railway Act of 1903, and the corresponding sections of the Act of 1906, has been prepared and appears as Appendix II., to Volume VI.

of the Canadian Railway Cases. With this table it is possible, without much trouble, to find in the Annotated Statute the notes bearing upon the re-arranged sections of the Act of 1906.

SUNDAYS AND NON-JURIDICAL DAYS.

A question may, it is thought, well be raised as to the legality of voting on by-laws for the creating of a debt on New Year's Day. The effect of section 203, of The Consolidated Municipal Act, 1903, is, in the writer's opinion, to preclude any voting on such by-laws on Sunday "or any day set apart by any Act of lawful authority for a public holiday, fast or thanksgiving."

The words enclosed in inverted commas are, it will be observed, taken from the first clause of the section, which deals with the matter of reckoning time, but the clause immediately following extends the operation of the section to anything required by this Act to be done on a day which falls on any of such days, afterwards providing that such thing, whatever it may be, may be performed on the next juridical day. It would seem, then, beyond dispute that other public holidays stand on precisely the same footing as Sundays, and so do not come under the term "juridical day."

If anything further were needed to demonstrate this it would be supplied by the final clause of the section, by which it was designed to save the nomination or election of candidates to fill municipal offices from the prohibition created. It has to be remembered, when seeking to bring the question of a voting on a by-law within the mischief of the section, that such a proceeding has been expressly comprehended by section 351, which incorporates the section alluded to, with others antecedent and subsequent, covering all which appoint the machinery for taking a vote.

In the *West Toronto Election Case*, 5 P.R. 436, the question of reckoning time dealt with by a similarly worded enactment came up for determination, and the case appears to be an authority for the position here contended for.

Regina v. Murray, 28 O.R. 549, brought up the point as to the validity of a trial by a judge under the Speedy Trials Act, conducted on the first day of July being Dominion Day, and equally with New Year's Day, a public holiday. Mr. Justice MacMahon there decided that the only day upon which other than judicial acts could not be performed was Sunday, and that the act under review was not of that description. But it can be of little consequence to inquire whether the act of taking a vote on a by-law be a judicial act or not, for it is unmistakably something required to be done by the Municipal Act, and must fall within the proscription. However, it would obviously be such an act, returning and deputy returning officers being judicial as well as ministerial officers.

A third case, the history of which happens to be well known to the writer, as being connected therewith, is *Re Brunke* and *Mariposa*, 22 O.R. 120. The point there was regarding the publication in a newspaper of some by-law on Good Friday, and the judge (Mr. Justice MacMahon), while laying it down that judicial acts alone were subject to the common law rule, considered that this was not one. The fact really was, as he held, that the newspaper had been published the day previously. Whilst this case is not directly in point it is of interest in the discussion.

J. B. MACKENZIE.

BENCH AND BAR.

The appointment of John Donald Cameron, Attorney-General of Manitoba, in the Greenway Government, to be a puisne judge of the Court of King's Bench of that Province, is one that will be welcomed by the Bar and the people generally. His personal qualities and legal attainments eminently qualify him for that high position. He is a distinguished graduate of Toronto University and has successfully practiced his profession for many years in Manitoba. It is noteworthy that so many of the judges of that province were never invested with the dignified title of K.C., in fact the Government has never

made use of its prerogative in that respect, all the gentlemen entitled to wear silk in Manitoba having been appointed by the Dominion Government prior to the decision of the Privy Council that the provinces had jurisdiction to make such appointments.

Whilst regretting the illness of the Hon. Mr. Justice Burdige, which for the present incapacitates him from attending to his duties as judge of the Exchequer Court of Canada, we are glad to notice that his place will, during his absence, be filled by Hon. Sir Thomas Wardlaw Taylor, Kt. formerly Chief Justice of Manitoba. The excellent judicial work of Sir Thomas Taylor in the past is a promise of continuous usefulness in the important position which he will now fill; though, we trust, the reason for the occupancy of the seat will not long continue.

Mr. Justice Barker, judge of the Court of Equity in New Brunswick, has been appointed Chief Justice of the Supreme Court of that province in place of Chief Justice Tuck, who was recently superannuated. The Hon. A. S. White, formerly Attorney-General of the province, has been appointed to succeed Mr. Justice Barker. It is presumed that in view of this re-organization of the Courts, a proclamation will be issued bringing into force the changes recently made in the practice and procedure of the Courts in New Brunswick, which will largely bring them into harmony with that prevailing in the Courts of the English speaking provinces of the Dominion.

The above appointments are most unexceptionable and will meet with the approval of the Bar.

The *Law Times* gives prominence to some thoughtful utterances of a well-known speaker in England in reference to modern journalism which it would be well to lay to heart even though no remedy is in sight.

“A restless superficiality and reckless love of pleasure make

the citizen a supple tool in the hands of the clever rogues of a corrupt Press, and a gullible victim of the 'Limerick craze.' The most menacing portent of the year is that the newspaper in its popular form is ceasing to be a factor in the education and uplifting of the masses of the people and becoming more and more an organ of enfeebling excitement and corrupting pleasure. It has become pictorial and not illuminating, photographic and mercenary, superficial and not instructive. A more lamentable set of facts than those associated with the 'Yellow Press' the year does not contain, except that the British and American people have not the sense and the courage to boycott, once and for all, the whole guilty tribe. Morality, patriotism, humanitarianism ought to force us all to take that course, and to take it at once."

A writer in the lay press calls attention to a matter which, not unnaturally, strikes him as having an element of unfairness in it. A certain learned judge recently struck a case off the list because the counsel for the plaintiff was not present. The writer takes exception to this as follows:—

"When lawyers are paid by clients to be present in Court, the fact that they are not there is a matter of personal negligence for which the clients are in no way responsible. For a judge to strike a case off the list simply visits the negligence of the lawyers upon their innocent clients. Not only will the trial of the case be delayed till the spring assizes, to the detriment of the litigants' interests, but they will have the doubtful pleasure of paying the additional costs of having the case brought down a second time to trial."

This mode of dealing with what may be, but is not always, carelessness of counsel is so common as not to be much thought of by a lawyer, but there is much force in what the layman says about it, and should make a judge think twice before he gives a litigant a fair fling at the way justice is sometimes administered. In saying this we assume of course that the facts of the case have been correctly stated.

REVIEW OF CURRENT ENGLISH CASES.

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**SHIP—MORTGAGE ON SHIP—RIGHT OF MORTGAGEE TO POSSESSION
—MORTGAGOR IMPERILLING SECURITY OF MORTGAGE.**

In *The Manor* (1907) P. 339 the Court of Appeal (Lord Alverstone, C.J., and Moulton, and Kennedy, L.J.J.) overruling Deane, J., held that where a mortgagor of a ship is imperilling the sufficiency of the mortgage security by sending the ship on a long voyage unprovided with sufficient funds, and even though the mortgage is not in default, the mortgagee may, nevertheless, take possession of the vessel.

SOLICITOR—CHARGING ORDER—FORM.

In *re Turner, Wood v. Turner* (1907) 2 Ch. 539. The form of the order made in this case noted ante, vol. 43, p. 644, is here given.

**COMPANY—DEBENTURES ISSUED AS SECURITY FOR DEBT—PAYMENT
OF DEBT FOR WHICH DEBENTURES HELD—RE-ISSUE OF SATIS-
FIED DEBENTURES.**

In *re Russian Petroleum & L. F. Co., London Investment Trust v. Russian Petroleum & L. F. Co.* (1907) 2 Ch. 540. A similar question came up in this case to that which was determined in *Re Tasker* (1905) 2 Ch. 587, noted ante, vol. 42, p. 178. In this case a limited company had issued a series of debentures as floating securities on the terms that the company should not, without the consent of the debenture holders, create any charge on the mortgaged assets ranking *pari passu* with, or in priority to, the charge created by the debentures. The company deposited, £100,000 of these debentures with a bank as collateral security for a credit of £150,000, by the terms of which the bank was to accept the company's drafts. This credit was not a current account, nor was anything advanced by the bank which was strictly speaking a loan. After this arrangement had been in force some time the amount due to the bank on the credit was paid off by the company. Immediately before the repayment the bank advanced £500 to the company in order to prevent the deposited debentures from being freed from all charges in favour

of the bank; and the debentures were not given back to the company. The other debenture holders claimed that the debentures deposited with the bank were satisfied by the payment of the credit, and could not be re-charged with the £500 or any other sum. Warrington, J., so held, and the Court of Appeal (Cozens-Hardy, M.R., and Barnes, P.P.D., and Kennedy, L.J.) affirmed his decision.

INFANT—WARD OF COURT—RELIGIOUS EDUCATION OF WARD—
WELFARE OF INFANT—INFANT'S CHOICE OF RELIGION—
CHANGE OF RELIGIOUS EDUCATION AT REQUEST OF INFANT—
DISCRETION OF COURT—FORM OF ORDER AS TO RELIGIOUS EDU-
CATION OF INFANT.

In *Re W. W. & M.* (1907) 2 Ch. 557, an application was made to the Court by the next friend of an infant for an order authorizing a change in the religious education of the infant in the following circumstances. The applicant was a youth of fourteen, and he and a sister who was about eleven, were the children of a Jewish father, both parents were dead, and the children were wards of Court. An order had been made in 1904 for the bringing up of both children in the Jewish faith. The boy had accordingly been placed with a Jewish school-master, but had expressed a desire to be educated as a Christian. He and his sister were attached to each other, and Kekewich, J., after seeing the boy came to the conclusion that his wish should be gratified, and as he thought it would be detrimental to the affection between him and his sister that they should be educated in different faiths, he made an order that both should be brought up as Christians. The guardian of the infants appealed and the Court of Appeal (Cozens-Hardy, M.R. and Moulton and Farwell, L.JJ.), while upholding the order as being in the circumstances in the best interest of the boy, considered that there was no sufficient ground for making the order as to the girl, as to whom it was therefore rescinded.

COMPANY—DIRECTORS' LIABILITY FOR FALSE PROSPECTUS—CON-
TRIBUTION—DIRECTORS' LIABILITY ACT, 1890 (53-54 VICT.
c. 64)—(R.S.O. c. 216, ss. 4-6.)

In *Shepherd v. Bray* (1907) 2 Ch. 571, the defendants appealed from the judgment of Warrington, J., (1906) 2 Ch. 235 (noted ante, vol. 42, p. 640) and after the case has been partially argued the judgment was reversed and action dismissed,

by consent of parties. The Court of Appeal in giving judgment in accordance with the consent, intimated that, after hearing the argument of counsel, they were not prepared to assent to all that Warrington, J., had decided.

**WILL—CONSTRUCTION—NEXT OF KIN ACCORDING TO STATUTE—
TIME FOR ASCERTAINING CLASS.**

In re Wilson, Wilson v. Batchelor (1907) 2 Ch. 572. The Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Farwell, L.JJ.), have affirmed the decision of Parker, J., on the construction of the will in question. The testator died in 1884 and by his will gave a life interest in a fund to his nephew Samuel, and certain contingent interests to the children and issue of Samuel, and declared that if no child or issue of Samuel attained a vested interest the fund was to be held "for such person or persons as on the death of my said nephew Samuel will be entitled to (*sic*) as my next of kin under the statute." At the date of the testator's death Samuel was his sole next of kin. Samuel died in 1906 without issue, and made a will appointing executors. Parker, J., held that the date at which the testator's next of kin were to be ascertained was the time of his own death, and not the death of Samuel, and that the executors of Samuel were, therefore, entitled to the fund; and that the words "at the death of my nephew" merely referred to the time when the persons entitled would come into possession.

**LETTERS OF DECEASED PERSON—BIOGRAPHY—USE OF INFORMATION
CONTAINED IN LETTERS FOR WRITING BIOGRAPHY—INJUNCTION.**

Philip v. Pennell (1907) 2 Ch. 577 was an action by the executor of the late J. A. M. Whistler, the celebrated artist, for an injunction to restrain the defendants Pennell from using, for the purpose of a biography they were writing of the late Mr. Whistler, and their co-defendants from printing and publishing information so derived. The plaintiff claimed that she had the sole right of publishing or permitting to be published any letters or other documents written by her testator, and claimed that the Pennells had applied to various friends of the deceased to procure letters or documents written by him being of a private or confidential nature, with a view to publishing

the same, or extracts therefrom. The Pennells set up by their defence that they were authorized by Mr. Whistler to write his biography, and for that purpose he gave them a large amount of information. They admitted the plaintiff's right to prevent the publication of private letters and documents written by Mr. Whistler. They admitted that they had procured copies of certain of his letters to various relations and friends, but, while they denied any intention of publishing them, they admitted that they intended to use for the biography information therein contained. Kekewich, J., who tried the action came to the conclusion that the Pennells though not entitled to publish the letters of the deceased or extracts or paraphrases therefrom without the plaintiff's consent, could not be restrained from using the information contained in such documents which had lawfully come into their possession for the purpose of compiling the biography, and the action was dismissed as against all of the defendants.

MARRIAGE UNDER FALSE NAME—WIDOW MARRIED IN MAIDEN NAME
—FALSE NOTICE.

In re Rutter, Donaldson v. Rutter (1907) 2 Ch. 592. A widow whose interest under her deceased husband's will ceased on her re-marrying, was married before a registrar in her maiden name, the previous statutory notice being false to the knowledge of both spouses in this and other respects. Eady, J., nevertheless, held that the marriage was valid, and that the interest of the lady in her deceased husband's estate had ceased.

TENANT FOR LIFE — REMAINDERMAN—PRIOR ANNUITY—CAPITAL
—INCOME.

In re Perkins, Brown v. Perkins (1907) 2 Ch. 596. In this case a testator, who had covenanted to pay an annuity, gave half his residue to trustees upon trust for his daughter for life, with remainders over. The residue was bearing interest at three per cent., and the question Eady, J., was called on to decide was, in what proportions the moiety of the annuity payable out of the daughter's share should be born by capital and income, and he held that it should be apportioned on the following basis, viz., ascertain what sum with simple interest at 3 per cent. would meet each instalment, and charge that sum to capital and the balance to income.

Correspondence.

TRIAL BY NEWSPAPER.

To the Editor, CANADA LAW JOURNAL:

DEAR SIR,—The modern practice of the daily press with regard to criminal cases in which strong public interest is taken has long since disgusted all who desire to have justice impartially and dispassionately administered.

The Thaw case was a striking illustration of this abominable tendency to poison the minds of average citizens—from whose ranks, of course, jurymen must be selected—and as an almost inevitable consequence to have prisoners tried not on the evidence given in Court, but on purely sentimental grounds advanced by sensational journalists. The second trial of Thaw generated another irruption of newspaper sensationalism. This kind of thing is now so common that it is probably impossible to stop it.

Numerous instances might be given of the shameless manner in which daily papers lead by their clamorous and indecent comments to verdicts which can scarcely be regarded as just or reasonable. The trial of a young Italian girl more than a year ago for the murder of her uncle and aunt was reported with “realistic” effects at such length and with such descriptive appendages calculated to influence public opinion that the jury, if they saw any of the public prints, had no alternative save to acquit the accused. These “reports”—if such they can be called—not only pollute the fountain of justice, but gratify those instincts of prurient curiosity which are only too keen amongst a certain depraved portion of every community.

Again the trial of Mrs. Bradley for the murder of Senator Brown was reported in the same “sensational” or “realistic” fashion as was the Thaw case. The lady was acquitted, though plain evidence of homicide was given, and, whatever may have been her wrongs, she could not have been exonerated from the charge of killing a man with the utmost deliberation. If newspapers continue to practice this system of sensational report-

ing, the administration of the criminal law will ere long become a perfect mockery. Trial by newspaper is not justice: it is the sacrifice of justice to sensationalism. It would be almost better to have prisoners tried with closed doors than to have the determination of their guilt or innocence dependent on the lurid accounts of trials furnished by hired scribes whose interest it is to distort and exaggerate everything that is said or that takes place in Court.

JUSTICE.

RE ONTARIO K.C. LIST.

To the Editor, CANADA LAW JOURNAL:

DEAR SIR,—An amazing list certainly. Many are good men, and many were on the list issued by the Dominion Government (Conservative) in 1896, but which was cancelled by the Laurier Government. Some of the present list have not been ten years at the Bar, which has always been understood to be a requirement. Some names are positively objectionable. An analysis of the list shews that no proper care has been exercised in preparing it. It is said that it is no worse than the last list, but that does not excuse the present Government. Every Conservative member in the Dominion House who is a lawyer is appointed. There are included in the list a few Liberals, which looks well. The value of a K.C. is pretty well gone, thanks to the appointments made in recent years. The list as a whole is indefensible. The profession looks to you to protest against this kind of thing.

READER.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] ROYAL PAPER MILLS CO. v. CAMERON. [Nov. 5, 1907.

Negligence—Master and servant—Dangerous machinery—Want of proper protection—Voluntary exposure—Findings of jury—Charge of judge.

An experienced master mechanic, who was familiar with the machinery in his charge, and had instructions to take the necessary precautions for the protection of dangerous places, in attempting to perform some necessary work, lost his balance and fell upon an unprotected gearing which crushed him to death. In an action for damages, questions were submitted to the jury without objection by the parties, and no objection was raised to the judge's charge at the trial. The jury were not asked to specify the particular negligence which caused the injury, and, by their answers found that deceased was acting under the instruction and guidance of the company's officers who were his superiors, at the time of the accident; that he had control of the work to be done but had not full charge, control and management of the machinery generally; that there was fault on the part of the company, and that he had not unnecessarily or negligently assumed any risk.

Held, affirming the judgment appealed from, Davies, J., dissenting, that as there was no evidence from which the jury could reasonably draw inferences and come to these conclusions as to the facts, and, in the absence of objection to the questions put to them and to the charge of the judge at the trial, the findings of the jury ought not to be interfered with on appeal. Appeal dismissed with costs.

J. E. Martin, K.C., and *Fraser*, K.C. (*Howard* with them), for appellants. *Lasfleur*, K.C., and *Cate*, K.C., for respondent.

Ont.]

[Nov. 13, 1907.]

HARRIS v. LONDON STREET RAILWAY COMPANY.*Negligence—Street Railway Co.—Rules—Contributory negligence.*

Rule 212 of the rules of the London Street Ry. Co. provides that "when the power leaves the line the controller must be shut off, the overhead switch thrown, and the car brought to a stop . . ." A car on which the lights had been weak and intermittent for some little time passed a point on the line at which there was a circuit breaker when the power ceased to operate. The motorman shut off the controller, but instead of applying the brakes, allowed the car to proceed by the momentum it had acquired and it collided with a stationary car on the line ahead of it. In an action by the motorman claiming damages for injuries received through such collision,

Held, that the accident was due to the motorman's disregard of the above rule and he could not recover. Appeal dismissed with costs.

Blackstock, K.C., for the appellant. *Hellmuth*, K.C., and *Ivey*, for respondents.

B.C.]

RED MOUNTAIN RY. CO. v. BLUE. [Nov. 20, 1907.]

Operation of railway—Unnecessary combustible matter left on "right of way"—Damages by fire—Issue as to point of origin of fire—Evidence—Charge to jury—New trial—Practice—Admission of evidence on appeal—Supreme Court Act, ss. 51, 73.

At the trial the controversy turned upon the question whether or not the place of the origin of the fire which caused the damages complained of was within the limits of the defendants' "right of way," which they were, by the provisions of the Railway Act, 1903, obliged to keep free from unnecessary combustible matter, and the jury found that it did, but the charge of the judge seemed calculated to leave the impression that any space from which trees had been removed, under the powers conferred by section 118(j) of that Act, might be treated as included within the "right of way."

Held, that, in consequence of the want of more explicit di-

reactions to the jury on the question of law, the defendants were entitled to a new trial.

The Court refused an application for the admission, as evidence, of plans of the right of way which were not produced at the trial but were only discovered after the date of the judgment appealed from. Appeal allowed with costs, and new trial ordered.

A. H. MacNeill, K.C., for appellants. *Nesbitt*, K.C., and *C. R. Hamilton*, K.C., for respondent.

B.C.] *McMEEKIN v. FURRY.* [Nov. 20, 1907.

Location of mineral claims—Contract—Fictitious signature—Unauthorized use of a firm name—Transfer by bare trustee—Statute of Frauds—R.S.B.C. (1897), c. 135, ss. 50, 130.

Where B. acting as principal and for himself only, signed a document containing the following provision: "We hereby agree to give F. one-half ($\frac{1}{2}$) non-assessable interest in the following claims" (describing three located mineral claims) in the name of "J. B. & Sons," without authority from the loca-tees of two of the claims which had been staked in the names of other persons, without their knowledge or consent.

Held, affirming the judgment appealed from (13 B.C. Rep. 20), that, although no such firm existed and notwithstanding that two of the claims had been located in the names of the other persons, who, while disclaiming any interest therein, had, afterwards transferred them to B., the latter was personally bound by the agreement in respect to all three claims and F. was entitled to the half interest therein.

A subsequent agreement for the reduction of the interest of F. from one-half to one-fifth, which had been drawn up in writing, but was not signed by F. was held void under the Statute of Frauds. Appeal dismissed with costs.

Davis, K.C., for appellants. *Jos. Martin*, K.C., for respondents.

N.S.] *HALIFAX ELECTION CASE.* [Nov. 27, 1907.

Controverted election—Appeal—Fixing time for trial.

No appeal lies to the Supreme Court of Canada from an order of the judges assigned to try an election petition fixing the date for such trial. Appeal dismissed with costs.

Mellish, K.C., for appellant. *W. B. A. Ritchie*, K.C., for respondent.

Ont.]

[Dec. 13, 1907.

CANADIAN PACIFIC RY. CO. v. OTTAWA FIRE INS. CO.

Constitutional law—Provincial companies—Powers—Operations beyond province—Insurance against fire—Property insured—Standing timber—Return of premiums—British North America Act, 1867, s. 92(11).

Held, per Idington, Maclellan and Duff, JJ., Fitzpatrick, C.J., and Davies, J., contra, that a company incorporated by the Legislature of a Province is not capable of carrying on its business beyond the limits of such Province.

Per Fitzpatrick, C.J. and Davies, J., sub-section 11 of section 92, of the British North America Act, 1867, empowering a legislature to incorporate "companies for provincial objects," not only creates a limitation as to the objects of a company so incorporated, but confines its operations within the geographical area of the Province creating it. And the possession by the company of a license from the Dominion Government under 51 Vict. c. 28 (R.S. 1906, c. 34, s. 4), authorizing it to do business throughout Canada is of no avail for the purpose.

Girouard, J., expressed no opinion on this question.

An insurance company incorporated under the laws of Ontario insured a railway company, a part of whose line ran through the State of Maine "against loss or damage caused by locomotives to property located in the State of Maine not including that of the assured." By a statute in that state the railway company is made liable for injury so caused and is given an insurable interest in property along its line for which it is so responsible.

Held, affirming the judgment of the Court of Appeal (11 O.L.R. 465), which maintains the verdict at the trial (9 O.L.R. 493), that the policy did not cover standing timber along the line of railway which the charter of the insurance company did not permit it to insure.

Held, also, Fitzpatrick, C.J., and Davies, J., dissenting, that the policy was not on that account of no effect, as there was other property covered by it on which the railway company had an insurable interest, therefore the latter was not entitled to recover back the premiums they had paid.

Appeal dismissed with costs.

Ewart, K.C., and *Spence*, for appellants. *Shepley*, K.C., and *Magee*, for respondents. *Newcombe*, K.C., for Dominion of Canada. *Ritchie*, K.C., *Nesbitt*, K.C., and *Mulvey*, K.C., for Ontario. *Lañctot*, K.C., and *Gervais*, K.C., for Quebec. *Jones*, K.C., for New Brunswick. *Nesbitt*, K.C., for Manitoba. *Mulvey*, K.C., for Saskatchewan.

Ont.]

[Dec. 13, 1907.

CANADIAN CASUALTY INS. CO. v. BOULTER AND HAWTHORNE.

Insurance—Sprinkler system—Damage from leakage or discharge—Injury from frost—Application—Interim receipt.

A policy of insurance covered loss by leakage or discharge from a sprinkler system for protection against fire but provided that it would not cover injury resulting inter alia from freezing. The water in a pipe connected with the system froze and the pipe being burst damage was caused by the consequent escape of water.

Held, affirming the judgment of the Court of Appeal (14 O.L.R. 166), *Davies*, J., dissenting, that the damage did not result from freezing and the insured could recover on the policy.

In the Hawthorne case the majority of the Court dismissed the appeal on the same grounds. The policy in that case was sent to the brokers who had applied for it on behalf of the assured shortly before, and the latter did not see it until the loss occurred.

Held, per *Davies*, J., that the contract of insurance was not contained in the policy but in what took place between the brokers and the agent of the insurers on applying for it, and as the latter informed the brokers that damage by frost was insured against the assured could recover.

Appeals dismissed with costs.

Watson, K.C., for appellants. *Blackstock*, K.C., and *Rose*, for respondents.

Ont.]

[Dec. 13, 1907.

DESCHENES ELECTRIC CO. v. ROYAL TRUST CO.

Contract — Electric lighting — Lessee of hotel — Partnership — Dissolution—"Assigns of lessee"—Cancellation of contract—Notice.

The electric company and S. entered into an agreement for

the supply of electric lighting in a hotel for ten years from 1st May, 1902, and it was provided that either party might cancel the agreement by notice in writing if, after the expiration of five years, neither S. nor his heirs, executors, administrators or assigns should be owner, tenant or occupier of the hotel, alone or with other persons. The lease to S. extended only until 1st May, 1907. It gave him no right to a renewal, and he had no other interest in the building. He sold a half-interest in the lease to two persons with whom he formed a partnership in the hotel business, which was carried on till 1904, when the partnership terminated by his death and the defendants were appointed administrators to his intestate estate. The affairs of the partnership were settled between the defendants and the surviving partners who became transferees of the business, exclusive owners of the lease and sole occupants of the hotel for the unexpired term. They gave notice to the plaintiffs to cancel the agreement, and on 1st May, 1907, obtained a new lease of the premises under which they continued in occupation and possession.

Held, that after 1st May, 1907, the new tenants were not assigns of S. and consequently, were entitled to cancel the agreement for electric lighting by notice according to the proviso. Appeal dismissed with costs.

G. F. Henderson, for appellants. *Orde and Powell*, for respondents.

Railway Board.]

[Dec. 13, 1907.]

GRAND TRUNK RY. CO. v. ROBERTSON.

*Passenger tolls—Third-class fares—Construction of statutes—
Repeal—Amendments by subsequent railway legislation.*

The legislation by the late Province of Canada and the Parliament of Canada since the enactment of section 3 of the statute of Canada 16 Vict. c. 37, in 1852, has not expressly or by implication repealed the provisions of that section requiring third-class passenger carriages to be run every day upon the line of the Grand Trunk Railway of Canada, between Toronto and Montreal, on which the fare or charge for each third-class passenger shall not exceed one penny currency for each mile travelled. Appeal dismissed with costs.

Nesbitt, K.C., for appellants. *Curry*, K.C., for respondent. *Baily*, K.C., for Ontario Government.

N.W.T.]

[Dec. 13, 1907.]

CANADIAN PACIFIC RY. v. THE KING, EX REL. KEAYS.

Railways—Constitutional law—Legislative jurisdiction—Application of statute—"The Prairie Fire Ordinance"—Works controlled by Parliament—Operation of Dominion railway.

In so far as they may relate to matters affecting the operation of a railway under the control of the Parliament of Canada, the provisions of c. 87, Con. Ord. N.W.T. (1898), s. 2, sub-s. (a) and (2) as amended by the N. W. T. Ordinances, c. 25 (1st sess.) and c. 30 (2nd sess.) of 1903, constitute "railway legislation" strictly so-called, and are beyond the competence of the legislature of the North-West Territories. *Canadian Pacific Ry. Co. v. Notre Dame de Bonsecours* (1899) A.C. 367 and *Madden v. Nelson and Fort Sheppard Ry. Co.* (1899) A.C. 626 referred to.

The judgments appealed from were reversed, Idington, J., dissenting. Appeal allowed with costs.

Nesbitt, K.C. for appellants. *Ford*, K.C., for respondents.

Ex. Ct.]

[Dec. 13, 1907.]

HILDBRETH v. MCCORMICK MANUFACTURING CO.

Patent of invention—Canadian Patent Act (R.S.C. 1906, c. 69, s. 38—Manufacture—Sale—Lease or license.

Held, affirming the judgment of the Exchequer Court (10 Ex. C.R. 378) that under the Canadian Patent Act a patent is void unless the patentee commences manufacture of the invention within two years from the date of the patent and carries it on continuously afterwards so that any person desiring to use it may obtain the absolute ownership. The patentee cannot refuse to sell it outright and insist on his right merely to lease it or license its use. Appeal dismissed with costs.

Walter Cassels, K.C., and *Anglin*, for appellant. *Gibbons*, K.C., and *Haverson*, K.C., for respondents.

Ex. Ct.]

[Dec. 13, 1907.]

DOMINION FENCE CO. v. CLINTON WIRE CLOTH CO.

Patent of invention—Novelty—Combination of known elements—Infringement—Mechanical equivalents.

A device resulting in the first useful and successful applica-

tion of certain arts and processes in combination for manufacturing purposes is not unpatentable for want of novelty, merely because some of the elements so combined have been previously used with other manufacturing devices. Judgment appealed from (11 Ex. C.R. 103) affirmed, and appeal dismissed with costs.

J. B. Clarke, K.C., for appellants. Walter Cassels, K.C., and A. W. Anglin, for respondents.

N.S.]

MCNEILL v. CORBETT.

[Dec. 13, 1907.]

Statute of Frauds—Mining areas—Transfer of interest—Part performance—R.S.N.S. (1900), c. 141, s. 4.

M. transferred to C. a portion of an interest in mining areas which he claimed was held in trust for him by the defendant. In an action by C. claiming a share of the proceeds of the sale thereof, no deed or note in writing of the assignment was produced as required by the fourth section of the Nova Scotia Statute of Frauds, and there was no evidence that, prior to the assignment, there had been such a conversion of the interest in question as would take away its character as real estate.

Held, that the subject of the alleged assignment was an interest in lands within the meaning of the Statute of Frauds and not merely an interest in the proceeds of the sale as distinguished from an interest in the areas themselves, and, consequently, that the plaintiff could not recover on account of failure to comply with that statute. It was shewn that, on settling with interested parties, the defendant had given M. a bond for \$500, as his share of what he had received on the sale of the areas.

Held, that as this act was not unequivocally and in its own nature referable to some dealing with the mining areas alleged to have been the subject of the agreement, it could not have the effect of taking the case out of the operation of the Statute of Frauds. *Maddison v. Alderson*, 8 App. Cas. 467, referred to.

Judgment appealed from (41 N.S.R. 110) reversed and appeal allowed with costs.

T. H. Bell, for appellant. Mellish, K.C., for respondent.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] **THE KING v. TOWNSEND.** [Dec. 14, 1907.

*Canada Temperance Act—Certiorari to remove search warrant
—Attachment for costs—Code ss. 1096, 1126—Crown Rules
(N.S.) 28, 32, Imp. Act 5 Geo. II. c. 19.*

Motion under section 1096 of the Criminal Code for leave to issue attachment against the defendant and his sureties on the recognizance filed preliminary to applying for a writ of certiorari to remove a search warrant under the Canada Temperance Act. (See 39 N.S.R. 189.)

The defendant with Sawyer and Smith entered into a recognizance as required by the Nova Scotia Crown Rule 28, to remove a search warrant made by two justices of the peace for the County of Kings. The application was refused by the Court in banco and after taxation of costs a demand was made upon the defendant and his sureties pursuant to 5 Geo. II. c. 19, and payment of costs not being made the Court was moved for an attachment.

Held, that the Nova Scotia Crown Rule 28 under which the recognizance in this case was taken was authorized by section 1126 of the Code, and as this recognizance was not estreatable nor collectible under the Code and the Crown Rules taken together, resort was properly had to the provisions of the Imperial Statute, 5 Geo. II. ch. 19, in attaching for the costs.

Per RUSSELL, J., dissenting, that Crown Rules 28 and 32 under which the recognizance in this case was taken were not authorized by section 1126 of the Code and the application should, therefore, be refused.

Roscoe. K.C., in support of motion. *Power*, K.C., contra.

Full Court.] **MCDougall v. Ainslie Mining Co.** [Dec. 14, 1907.

Lord Campbell's Act—Claim of damages under—Finding of jury set aside—New trial—Verdict, effect of.

Plaintiff claimed damages under Lord Campbell's Act for the loss of his son who was killed by a fall of stone in defen-

dant's mine. The jury, in answer to a question submitted by the trial Judge, found that the specific act of negligence that caused the injury was the failure of defendant to properly examine the face of the wall from which the rock fell. There was uncontradicted evidence on the part of defendant that several of the officials of the company, before starting work, went carefully over the banks and walls for the purpose of ascertaining whether they were safe.

Held, that the finding of the jury was not justified and that there must be a new trial.

Also, that the jury having placed their verdict on this one ground which could not be justified under the evidence, the Court could not give a wider scope to their answer so as to embrace other acts of negligence pointed out, or to rectify the error or misunderstanding of the jury.

McInnes, K.C., for appellant. *D. McNeil*, for respondent.

Full Court.] • MCQUEEN v. MCQUEEN. [Dec. 14, 1907.

Estoppel—Settlement of controversy—Imperfectly drawn document—Effect given to.

The ancestors of plaintiff and defendant received a joint grant of land from the Crown and used and occupied different parts of the land included in the grant as tenants in common.

N. being in debt, in order to save his property from his creditors, gave a deed to his brother A. of his right and title in the whole grant, but remained in possession, use and enjoyment of the land occupied by him as before. Subsequently he demanded a reconveyance from A. and his heirs, and a controversy which arose was settled by the heirs of A. conveying to N. one portion of the land, and N. executing to the heirs of A. what was intended as a release and quit claim of all his interest in the other portion of the land, including that in question.

Held, that although the release was badly drawn and failed to express in clear and distinct terms the nature of the transaction between the parties, as this was the clear inference to be drawn from the documentary evidence and the surrounding circumstances the Court would give effect to it.

J. J. Ritchie, K.C., for appellant. *Livingstone*, for respondent.

Full Court.] IN RE RUTH WHITE. [Dec. 14, 1907.

Lunatic—Appointment of guardian—Married woman—Capacity to act.

Where a married woman possessed of property in her own right and otherwise qualified is appointed guardian of the person and estate of a person of unsound mind, the appointment will not be set aside on the sole ground of her standing as a married woman.

Since the Married Woman's Property Act, R.S. (1900), c. 112, many of the objections formerly urged against the appointment of a married woman as trustee have been swept away and a married woman may now accept a trust by virtue of her power to contract as a femme sole.

O'Connor, for appellant. *Kenny*, for respondent.

Full Court.] DONNELLY v. VROOM. [Dec. 14, 1907.

Fishery—Public right of—Ownership of flats between high and low water mark—Digging clams.

Plaintiff claimed damages from defendants for the conversion of a dory, its oars, and a quantity of clams.

Defendants paid a sum of money into Court in respect to the dory and oars, but counterclaimed for the clams which they claimed were dug upon flats of which they were owners from high to low water mark.

Held, dismissing defendants' appeal, and affirming the judgment of the trial Judge that the digging of the clams in question was done in the exercise of a public right of fishery and that defendants' ownership of the flats was subject to such right.

J. J. Ritchie, K.C., for appellants. Roscoe, K.C., and F. Jones, for respondent.

Full Court.] [Dec. 14, 1907.]

AUSTEN v. CANADIAN FIRE ENGINE CO.

Principal and agent—Commission—Right of agent to recover where sale not completed.

Defendant company entered into an agreement in writing to pay plaintiffs a commission of five per cent. upon all sales

effected in the district of H. and vicinity on condition that plaintiffs would give their best services as might be desired from time to time, etc. Plaintiffs assisted defendant to obtain a contract with the city of H. for the purchase of one of their engines, to be constructed according to specifications attached, provided the engine when completed should undergo certain tests to the satisfaction of persons to be appointed by the city for that purpose.

The engine when completed failed to undergo the stipulated tests and was not accepted.

Held, that plaintiffs, notwithstanding, were entitled to their commission.

J. J. Ritchie, K.C., and *Tighe*, for appellant. *Allison*, for respondents.

Full Court.]

[Dec. 14, 1907.]

RICHARD SS. CO. v. CHINA MUTUAL INS. CO.

Marine insurance—Prohibited waters—Breach of warranty.

A policy of insurance issued by the defendant company on the plaintiff steamer "Richard" covered the steamer from July 6th, 1905, to July 6th, 1906. By a clause in the policy, the steamer was prohibited from using certain waters including Cape Breton, between December 1st and May 1st, but by a clause written in on the face of the policy, permission was given to use Cape Breton ports until January 1st, 1906. The steamer left Halifax in ballast on 31st December, 1905, for Port Hastings, in the Island of Cape Breton, and arrived there January 1, 1906. She took in a cargo of coal on January 2nd, and left for Yarmouth on the 3rd, having been prevented by the condition of the weather from leaving sooner.

Held, affirming the judgment of the trial judge, that the use of the Cape Breton port after January 1st, was a breach of a plain term in the policy and a breach of warranty that avoided the policy.

Burchell for appellant. *MacIlreith*, for respondent.

Longley, J.]

WALLACE v. DAVIS.

[Dec. 24, 1907.]

Practice—Order—Power of amendment.

When an order is inadvertently drawn in such a way as not to carry out the judgment of the Court, the Court has power to amend it so as to make it conform to the terms of the judgment.

The solicitor whose want of care has made the application for amendment necessary will not be allowed costs of the application.

O'Hearn, for plaintiff. *Kenny*, for defendant.

Laurence, J.]

HUBLEY v. HUBLEY.

[Jan. 7.]

Deed—Delivery—Presumption.

Defendant engaged a Crown land surveyor, who was also a justice of the peace, to prepare a plan and description of a lot of land owned by defendant and to draw a deed of the same to his son. The deed was written and executed by defendant and his wife in the presence of the justice who took the wife's acknowledgment of dower and the attestation of the witness and returned the deed to defendant. Defendant's son married plaintiff and erected a house on the lot of land and occupied it with plaintiff until shortly before his death. There was evidence to shew that the deed was read over by the son and his wife in defendant's presence and that defendant agreed to record it, but did not do so and retained possession of the deed until after his son's death when he destroyed it. In an action by plaintiff on behalf of herself and her infant child, claiming a declaration that the lands described in the deed were conveyed by defendant to his son and were the property of the son at the time of his death,

Held, that the retention of the deed by defendant under the circumstances mentioned was not sufficient to rebut the presumption of delivery.

Mellish, K.C., and *Kenny*, for plaintiffs. *Mackay*, K.C., for defendant.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] IN RE MORRIS ELECTION. [Oct. 18, 1907.

Election petition—Preliminary objections—Proof that deposit made in current money of Canada—Affidavit verifying petition—Scrutiny of votes and correction of return—Proof of petitioners' status—Allowing additional evidence to prove status—Want of prosecution.

The following points were decided by Mathers, J., on preliminary objections.

1. It is sufficient proof that the deposit required by section 22 of R.S.M. 1902, c. 34, for security for costs has been made in current money of Canada, when the identical Dominion notes handed to the prothonotary are produced, and the prothonotary swears to such identity, and a bank official with ten years' experience swears that they are genuine Dominion notes, that he recognizes them by the paper and the scroll upon them and by their general appearance, although he does not know by whom the notes should be signed or the genuineness of the signatures.

2. It is not necessary that any affidavit verifying the petition should be presented with it. Such affidavit is not required by the Manitoba Act, although it is required by the corresponding Dominion Act. Section 10 of the Manitoba Act does not empower the judges to make a rule limiting the right of an elector to present a petition to those electors who might be able to make such an affidavit, as that would be inconsistent with section 14 of the Act, which says that an election petition may be presented by any elector who had a right to vote at the election in question. Consequently the provision in the Dominion Act referred to is not, by virtue of section 13, brought into force in Manitoba.

3. Since a deposit in money has been substituted for the recognizance or bond required by rule 11 of the rules made by the judges of the Court under the powers conferred by section 10 of the Act, it is no longer necessary to serve any notice of the furnishing of security.

4. Paragraphs of the petition which do not allege any corrupt practice within the meaning of that term as used in the Act are not demurrable on that ground, and objections to such paragraphs on the ground that they ask for a scrutiny and claim the seat on behalf of the defeated candidate should not be allowed. See sections 16, 67, 90 and 129, also Imperial rule 7 and Manitoba rule 19.

5. It is sufficient proof under section 183 R.S.M. 1902, c. 52, of the right of the petitioner to vote, if it be shewn that his name is on the last revised list of electors for the whole electoral division, or if it be shewn that his name is on the list actually used by the deputy returning officer, and received by him from the returning officer at the election, together with proof of the identity of the petitioner in either case.

6. It is, however, necessary that the petitioner should establish that he is not disqualified as an elector under section 184 of the Election Act, and to shew that he is a male, twenty-one years of age, a British subject by birth or naturalization, and is not disqualified in any of the several other ways enumerated in that section.

7. The petitioners should, however, be allowed to adduce further evidence to meet this last objection upon payment of any costs occasioned by further attendance of the respondent's solicitor. The petitioners were allowed three weeks, or such further time as upon special application might be allowed, to furnish the necessary evidence of their qualification under section 184 of the Act.

An appeal from the above judgment as to allowing additional evidence to be put in to prove the status of the petitioner, dismissed with costs.

O'Connor and Blackwood, for the petitioners. *A. J. Andrews*, for the respondent.

Full Court.]

YASNE v. KROUSAN.

[Nov. 25, 1907.]

Contract — False representation — Rescission — County Courts Act, R.S.M. 1902, c. 36, s. 61 — Equitable relief in County Court action.

The plaintiff's claim was to recover the sum of \$85 paid to the defendant under an agreement of sale which he alleged had

been procured by false representation on the part of the defendant. Plaintiff's statement of claim did not ask to have the agreement cancelled.

The County Court judge entered a verdict for plaintiff for the amount claimed, but did not order the cancellation of the contract.

Held, on appeal to this Court, that, without a rescission of the contract, there could be no recovery of the amounts paid under it.

Held, also, that the County Court has no jurisdiction to cancel contracts on the ground of fraud, and that s. 61, sub-s. (6), of R.S.M. 1902, c. 38, which confers equitable jurisdiction when the subject of the action is "an equitable claim and demand of debt, account or breach of contract, or covenant or money demand, whether payable in money or otherwise," does not apply in a case like the present.

Burbidge, for appellant. *Richards*, for respondent.

Full Court.] THORDARSON v. JONES. [Nov. 25, 1907.

Commission on sale of land—Exchange of land—Appeal from findings of fact by trial judge.

The plaintiffs were real estate agents and sued for commission on an exchange of lands between the separate defendants which the plaintiffs alleged had been effected through their instrumentality. The trial judge dismissed both actions but the Court of Appeal reversed his finding of facts and held that the evidence shewed that the defendants, who had separately listed the respective properties with the plaintiffs for sale, had been brought together at the plaintiff's office and that the exchange had resulted from that introduction, and that the plaintiffs were entitled to half the usual commission and all costs.

Hoskin, and *Hanneson*, for plaintiffs. *Wilton*, and *McMurray*, for defendants.

Full Court.] ROSEN v. LINDSAY. [Nov. 25, 1907.

Action of deceit—Damages—Liability to make representation good.

Judgment of Mathers, J., noted vol. 43, p. 421, reversed with costs on the ground that, as the plaintiff had sustained no actual

loss by making the purchase of the property he could recover no damages in an action of deceit based on false representations as to its value.

Peek v. Derry, 37 Ch.D. 541, 14 A.C. 337; *McConnell v. Wright* (1903), 1 Ch. 546, and *Steele v. Pritchard*, ante, *infra*, followed.

A. B. Hudson, for appellant. Managhan and Blackwood, for plaintiff.

Full Court.] . STEELE v. PRITCHARD. [Nov. 25, 1907.

Action of deceit—False representation—Damages.

Appeal from decision of Mathers, J., noted. vol. 43, p. 258, allowed with costs on the following grounds:—

1. The evidence shewed that the plaintiffs Powell and Buell had not made any independent contract with the defendants for the purchase of the lands in question, but had only acquired an interest with the plaintiff Steele in the option which he had secured from the defendants before the making of the alleged false representation and that, if the defendants had made any false representations to the said Powell and Buell at the time they acquired such interest, the only remedy Powell and Buell could have would be an action of deceit based upon the alleged fraud of the defendants in inducing them to enter into the agreement with Steele to acquire an interest with him in the option, to which action Steele would not be a proper party. The deceit alleged in the pleadings and urged at the trial was in negotiating a contract between the three plaintiffs and the Land Company, the defendants acting as agents, and not in the negotiations of a contract between Steele and the other plaintiffs, in which the defendants were not required to take any part and in which, perhaps, they had no interest.

The issues and evidence in the two cases might be widely different and an amendment of the pleadings setting up such new case, asked for first at the hearing of the appeal, should not be allowed; but Powell and Buell might, if so advised, notwithstanding the dismissal of the present action, being a new action on the grounds now urged.

• 2. Per PHIPPEN, J.A.:—After discovering the alleged fraud the plaintiffs might, if the facts they alleged were true, have sued the company for the return of their \$5,000 deposit or brought an action of deceit against the defendants, laying their

damages at the amount paid out. Instead of that, however, they exercised their privilege of making a new contract directing the company to retain, as part of the purchase money thereunder the \$5,000 previously paid for the option. The plaintiffs, having thus received back the only money from which they were parted by the alleged misrepresentation, cannot further recover by way of damages.

It being admitted, further, that the plaintiffs suffered no loss by means of this purchase, but made a substantial profit by the resale of the lands, they could recover no damages for having been induced to enter into the contract. .

McConnell v. Wright (1903), 1 Ch., at p. 554; *Peck v. Derry*, 37 Ch.D., at p. 541; *Smith v. Bolles*, 132 U.S.R. 125, and *Sigafus v. Porter*, 179 U.S.R. 116, followed.

J. Campbell, K.C., and *Wilson*, for plaintiffs. *Robson* and *Johnson*, for defendants.

KING'S BENCH.

Mathers, J.] PONTON v. CITY OF WINNIPEG. [Oct. 18, 1907.

Municipality—By-law or resolution of—Contract of municipality requires by-law—Estoppel by conduct—Real Property Act, R.S.M. 1902, c. 148—Winnipeg charter, 1902, c. 77, s. 387—Meaning of expression “sufficient evidence” in a statute.

Certain lands of the plaintiff having been sold to the City of Winnipeg for arrears of taxes, the city under the provisions of R.S.M. 1902, c. 117, s. 203, et seq., applied for, and, on April 7, 1902, procured certificates of title under the Real Property Act for the lands. Pursuant to an amendment of the city charter passed in 1903, the City Council on 14th December, 1903, adopted a resolution that all the lots in question be conveyed to the plaintiff on payment of all costs, interest, and taxes to date. The council afterwards, on April 18, 1904, rescinded the resolution; but, two days prior to such rescission, the plaintiff tendered to the City Treasurer the amount specified in the resolution and demanded a conveyance.

Held, that the corporation could not bind itself by resolu-

tion and that, in the absence of a by-law, there was no contract with the plaintiff of which he could have specific performance by the defendants ordered. *Bernardin v. North Dufferin*, 19 S.C.R. 581, and *Tracey v. North Vancouver*, 34 S.C.R. 132, followed.

As the lots still stood in the plaintiff's name up to April, 1902, the city assessor assessed them to the plaintiff in the roll for 1902 which he had previously prepared; and, there being no appeal from such assessment, the same was confirmed and finally revised in June following. The usual assessment notice was sent to the plaintiff on May 3, 1902, and, in the following November, the tax collector sent the usual notice and demand for taxes of 1902 to the plaintiff. These steps were all taken by the city officials in accordance with their statutory duties and without any special authority or instructions from the City Council.

Held, that the city was not estopped by the sending of such notices from relying on its certificates of title obtained in April, 1902.

It was further contended on behalf of the plaintiff that the steps taken had the effect of making him legally liable to the city for the taxes of 1902, as section 387 of the charter provides that the production of a true copy of the tax roll shall be sufficient evidence of the debt for taxes, and therefore the city was asserting two absolutely inconsistent rights.

Held, however, that "sufficient evidence" does not mean conclusive evidence, and it would be a complete answer to such an action that the plaintiff was not the owner of the lands at the time of the return of the assessment roll and its final revision.

Galt and Minty, for plaintiff. *I. Campbell, K.C.*, and *Hunt*, for defendants.

Perdue, J.A.] THE KING v. GEORGE SMITH. [Nov. 21, 1907.

*Manslaughter—Killing of fugitive suspect by peace officer—
Shop-breaking—Criminal Code, 1906, ss. 30, 41.*

The accused was indicted for manslaughter. It appeared that he, being a peace officer, was endeavouring to arrest, without warrant, a man whom he, on reasonable and probable grounds, believed to have been guilty of the theft of valuable furs from the shop of a merchant tailor in the City of Winnipeg.

The deceased on October 14th, 1907, offered the furs for sale at a price greatly under their value to McFarlane, another merchant tailor, who suspected that they were stolen, and arranged with the deceased to come to the shop the next morning to get his money, and then informed the police. The accused had been informed of the theft of the furs and of the circumstances under which they had been stolen, and the next morning went to McFarlane's shop and waited there expecting that the deceased would come for his money. On the arrival of the deceased at McFarlane's shop on the morning of the 15th of October, he caught sight of the accused and immediately bolted out of the door and ran away. The accused followed him in an endeavour to effect his arrest and fired several shots from his revolver in an effort to frighten the deceased into stopping, but without avail, and the deceased increased his lead until the accused came to the conclusion that the only way of preventing the escape of the deceased at the time was to wound him in the leg. He accordingly aimed at the man's leg for that purpose, but the bullet struck the deceased in the head killing him instantly.

In charging the jury upon the evidence the learned trial judge left two questions to them, first, under section 30 of the Criminal Code, as to whether the accused, on reasonable and probable grounds, believed that an offence for which the offender may be arrested without warrant had been committed and that the fugitive had committed that offence. In discussing this point the jury were told that, if a person opens a door leading to a shop or store by lifting the latch or turning a knob and enters the store, although during business hours, with the intention of stealing something in the store, he may be convicted of shop breaking, so that if the accused believed, on reasonable and probable grounds, that the fugitive had in that manner entered the shop from which the furs had been stolen, he would be justified in believing that the fugitive had committed the offence of shop breaking and theft, for which offence he might have been arrested without a warrant, although not for simple theft out of a store. The jury were also told that if they found that the accused, on reasonable and probable grounds, believed that an offence for which the fugitive might have been arrested without warrant had been committed, and that the fugitive had committed that offence, they would further have to consider the question, arising under section 41 of the Criminal Code, whether the force used by the accused to prevent the escape of the fugitive by such flight was necessary for that purpose, and whether

such escape could have been prevented by reasonable means in a less violent manner, or in other words, whether the accused did the shooting of necessity or not, and whether he exceeded the powers conferred on him by law in firing the revolver at the fugitive. Upon these points the judge proceeded as follows: "If you have got over the first serious difficult question, and find that Smith had a right to arrest Gans, that is that he believed Gans had committed an offence for which he might be arrested without a warrant, then Gans was fleeing to evade arrest, and Smith was justified in using reasonable force in order to apprehend him and prevent his escape. The grave question here is, what is the degree of force which Smith should have used, and the first thing for you to consider is, could Smith have apprehended that man by any other means whatever except by shooting him. If you find he could have apprehended him by any other means, then Smith was not justified in shooting him. Shooting is the very last resort. It is shooting with a dangerous weapon like a revolver which might cause death. A man who is fleeing may be tripped up, thrown down, struck with a cudgel and knocked over and, if he strikes his head on a stone and is killed, the police officer is absolved because he was fleeing from arrest. But when it comes to discharging a dangerous weapon it is the last resort and cannot be justified unless it is shewn no other means could have been taken in effecting the arrest." (The learned judge then reviewed the evidence of the chase, and proceeded), "It is the duty of every citizen, when called upon, to help capture and pursue a criminal when flying from arrest, especially if he is called upon by the police. You will have to reconsider whether Smith, if he had not had that revolver, or had kept it in his pocket could not have called to his assistance passers-by, who would have joined him in the pursuit and have arrested Gans' flight. You will also have to consider whether Smith should have abandoned the pursuit of Gans at that time. He says his breath failed, his wind was gone, and should he not have called upon some of the others who were running behind him, asking them to run and keep Gans in sight until another policeman came up? You will have to consider if that might have been done to stop Gans. It was admitted that the bullet which caused his death was fired by Smith with the intention of wounding him, but unfortunately it struck him on the head and caused his death. Unless Smith was justified at law in the manner I have pointed out he would be guilty of manslaughter."

At the request of counsel for the defence his lordship further explained to the jury that the escape referred to in the Code meant escape from the flight then going on and that the possibility of the fugitive being found and apprehended subsequently need not be considered.

Hagel, K.C., and Patterson, for the Crown. Bonnar, Potts and Howell, for accused.

Mathers, J.]

FENSON v. BULMAN.

[Nov. 27, 1907.]

Contract—Performance—Completion prevented by fire—Acceptance of insurance money on property destroyed, effect of.

The plaintiffs contracted to put a passenger elevator into the defendants' four-story block in course of erection for \$2,800 to be paid as follows. One-half on delivery of machinery at the building, one-quarter when machine is in place, and the balance on completion. The machinery was delivered at the building in July, 1904, and defendants paid one-half of the price. The building and all its contents were destroyed by fire on the 11th of October following. At that time the "controller," although it was in the basement of the building, had not yet been put in its place.

Held, that the plaintiffs had not earned the second payment stipulated for.

Fairchild v. Rustin, 39 S.C.R. 274, and *Ross v. Moon*, 17 M.R. 24, followed.

The plaintiffs claimed in the alternative that they were entitled to recover the price of the elevator quantum meruit because the defendants had insured the elevator for its full value and had collected and received the full amount of the insurance, having included the value of the elevator in their proofs of loss sent in to the insurance companies, and should, therefore, be deemed to have accepted it. It appeared, however, that the defendants had left the placing of the insurance upon their property in the hands of their agent and had not instructed him to insure the elevator and were not aware, when their proofs of loss were made, that the elevator had been so included, and that their total loss was much in excess of the total insurance.

Held, that the defendants, having paid \$1,400 on the elevator, had an insurable interest in it and a right to receive the insurance money, and that what they had done in connection

with the insurance did not constitute an acceptance of the elevator.

Galt and Minty, for plaintiffs. *Munson, K.C., and Laird*, for defendants.

Mathers, J.]

IN RE MORRIS ELECTION.

[Nov. 29, 1907.

Election petition—Want of prosecution.

Motion to dismiss the petition herein on the ground that six months had elapsed without the trial having been commenced or any order made enlarging the time for commencing it. There is no provision in the Manitoba Controverted Election Act, R.S.M. 1902, c. 34, or in any of the rules of Court applicable to election petitions in the Province, limiting the time within which the trial must be commenced. Section 39 of the Dominion Controverted Elections Act does, however, contain such a provision and the respondent's contention was that that section of the Dominion Act is incorporated into the local Act by the effect of sections 10 and 13 of the latter Act.

Section 10 gives power to the judges to make general orders for the effectual execution of the Act and of the intention and object thereof, and the regulation of the practice and procedure with respect to election petitions and the trial thereof, and section 13 says that, "in all cases unprovided for by such rules when made, the principles, practice and rules then in force, by which election petitions touching the election of numbers of the House of Commons of Canada are governed shall be observed, so far as, consistently with this Act, they may be so observed." Since section 39 of the Dominion Act was first enacted, the Manitoba Act has on several occasions been revised and amended.

Held, that, in interpreting an Act which creates new jurisdictions or delegates subordinate legislative or other powers, the principle of strict construction should be applied and a distinct and unequivocal enactment is required for the purpose of either adding to or taking from the jurisdiction of the Court: "It is impossible to suppose that the legislature intended, as it were by a side wind, to bring into operation so important a provision as section 39 of the Dominion Act, and the Court will not assume that such was the intention: *Smith v. Brown*, L.R. 6, Q.B. 729. Even if section 13 is sufficiently wide to include the provisions of the Dominion Act, only such provisions of it

as the judges would have jurisdiction to enact as rules of Court under section 10 are brought into force, and the judges would not have power to make such a rule as the one sought to be invoked, which would be something more than a rule of practice or procedure. *The Queen v. Powlett*, L.R. 8 Q.B. 491, is very much in point." On appeal to the Court of Appeal the above judgment was upheld.

O'Connor and *Blackwood*, for petitioners. *A. J. Andrews*, for respondent.

Province of British Columbia.

SUPREME COURT.

Hunter, C.J.] REX v. FOUR CHINAMEN. [Nov. 23, 1907.

Criminal law—"Disorderly house" defined—What constitutes
—Inmates—Criminal Code, section 228.

The term "disorderly house" includes any house to which persons resort for criminal or immoral purposes, and it is immaterial that the house is conducted quietly so as not to disturb the neighbours. *Queen v. France*, 1 Can. C.C. 231; *Ex parte Cook*, 3 Can. C.C. 72, and *Rice v. Rice*, 1 Can. C.C. 2, considered.

Killam, for the Crown. *Farris*, for the accused.

Hunter, C.J.] WILLIAMS v. HAMILTON. [Nov. 24, 1907.

Vendor and purchaser—Contract for sale of land—Offer—Acceptance—Correspondence.

Defendant, being in Montreal, and owning property in Vancouver, instructed his agents to obtain a purchaser at \$1,400, offers to be first submitted to him. They received an offer and gave a receipt for a deposit of \$25, price \$1,400, \$900 or \$950 cash, balance C.P.R. subject to owner's confirmation, and telegraphed defendant, "Deposit on lot Kitsilano, \$1,400. Wire approval and instructions." Defendant wired in reply, "\$1,400 O.K. letter instructions," at the same time writing that his

papers were in the bank and could not be obtained until his return to Vancouver; that he wanted \$1,400, net to him, and if this was satisfactory he would complete the transaction on his return to Vancouver.

Held, that there was no concluded bargain between the parties. And also, that the defendants F. and F. had not represented that they were, nor assumed to act as, the owner's agents.

Macdonell and *Brown*, for plaintiff. *Craig*, *Bourne* and *MacGill*, for various defendants.

Full Court.] *BOLE v. ROE.* [Nov. 28, 1907.

Practice—Appeal—Time for taking appeal under Water Clauses Act, 1897, R.S. c. 190, s. 39—"Decision."

In an appeal to the County Court judge from the decision of the Water Commissioner, objection was taken to the jurisdiction of the County Court judge under section 36 of the Water Clauses Consolidation Act. The objection was overruled. Section 39 of the Act provides for an appeal to the full Court by "any person dissatisfied with the decision of a judge of the Supreme or County Court provided that notice of appeal be given to the opposite party within twenty-one days from such decision"

Held, that the term "decision" as used in section 39 means the final disposition of the whole case before the Supreme Court judge, especially in view of the provisions in the section that such appeal shall be dealt with by the full Court in the same way as an ordinary appeal from a final judgment in an action in the Supreme Court.

Harris, K.C., for appellants. *Martin*, K.C., for respondents.

Clement, J.] *STEVENSON v. SMITH.* [Nov. 29, 1907.

Principal and agent—Authority of agent—Delegation—Statute of Frauds.

An agent "thereunto lawfully authorized" within the Statute of Frauds, cannot delegate his authority.

An agent who, at the time of making a contract, has failed to bind his principal, by a written note, or memorandum within the statute, cannot sign an effectual note or memorandum after his authority as agent to sell has been withdrawn.

Martin, K.C., for plaintiff. *Wilson*, K.C., for defendant.

Full Court.]

[Nov. 28, 1907.]

WORLD PRINTING CO. v. VANCOUVER PRINTING CO.

Practice—Costs—Successful party—Power to deprive him of costs—"Good cause"—Marginal Rule 976.

In an action for libel between two newspapers arising out of statements as to their respective circulation, the trial judge found on the facts that the statement made by the defendant newspaper was not established; but he came to the conclusion that there had been no special damage suffered by the plaintiff newspaper in consequence of the statement, and gave judgment dismissing the action without costs.

Held, that under the rule governing costs in British Columbia, as distinguished from the English rule, the trial judge must find good cause for depriving a successful party of his costs; and here there was not such good cause.

Davis, K.C., for appellant (defendant company). *Martin*, K.C., and *Wintemute*, for respondent (plaintiff company).

JUDICIAL APPOINTMENTS.

Hon. Sir Thomas Wardlaw Taylor, Kt., to be judge, pro tem., of the Exchequer Court of Canada during the illness of the Hon. Mr. Justice Burbidge. (Jan. 21.)

John Donald Cameron of the City of Manitoba, Barrister-at-law, to be puisne judge of the Court of King's Bench for Manitoba. (Jan. 21.)

Edward Arthur Cracken McLorg, barrister-at-law, to be judge of the District Court of the Judicial District of Saskatoon, in the Province of Saskatchewan. (Dec. 10, 1907.)

The Living Age opens well for the new year. No publication that we know of gives so continuously such good reading as does this compilation, and this is not surprising as it gets its material from all sources. It is refreshing to see something substantial and informing amidst the mass of foolish trash and insane stories which now so generally form the literary food especially of young people. The articles selected are from such publications as the *Fortnightly Review*, *Cornhill*, *London Times*, *Nineteenth Century*, *Blackwood's*, etc.

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LAW REFORM IN ONTARIO.

The Attorney-General of Ontario has by his resolution, quoted hereafter, signified his intention of dealing with the much discussed subject of law reform. More than a year ago this was promised, but we do not quarrel with the delay, for the subject is one that should receive most careful consideration and only be dealt with after due deliberation. The proposed measure has not yet been given in detail; but we have it rough hewn in the resolution referred to.

We trust, however, that the attention it may receive will not be in the spirit indicated in a leading daily paper which said it had discovered in law reform "a programme to fight for." The same journal also says the present system is "a conspicuous and ignominious failure and possesses nothing sacred or even dignified in its decrepitude." It seems odd that in 1902 the same journal which uses this extravagant language congratulated the country on the condition of its legal procedure in the words following:—"The suitor no longer spends half a fortune with no better result than to find out that he is in the wrong Court; the best talent of the legal profession is no longer wasted in sharp practice and scientific hair-splitting; multiplicity of actions has been discouraged in favour of expedition and directness, as well as completeness of remedies; and law and equity, so far as the administration of justice is concerned, have become synonymous terms."

What was so excellent in 1902 cannot be so bad in 1908; but it may be remarked that the "outs," were then in, and now the "ins" are out, which naturally accounts for the milk in the political cocoanut.

The matter, however, is too important to be made a mere football for party wrangles, and we have sufficient confidence in the

leaders on both sides of the House, that when the matter comes up for discussion they will agree that law reform shall not be the object of a mere political crusade or as something which is denied or neglected on one side, and must, therefore, be fought for tooth and nail on the other.

The subject is confessedly one of the most difficult that could engage the attention of jurists and statesmen, and requires the fullest and most patient consideration from the best minds of both parties, with the aid of all the light that can be gained from the ability and experience of those who are learned in the law. Just here we would venture to suggest that any draft bill should be sent to the profession for their consideration and suggestions. And in a matter of this kind it is especially desirable to make haste slowly.

It is unnecessary to say that this subject should be approached in the spirit of those great English Chancellors, Lord Cairns and Lord Selborne, who though strenuous opponents in politics, joined together in loyal and cordial co-operation to promote every measure which tended to improve or simplify the principles and practice of the law. It is to the unselfish efforts of these, and like-minded men, that are due such notable measures as the Common Law Procedure Act, the Judicature Acts, the Conveyancing and Settled Lands Acts, and many others which have borne good fruit in this, as well as in the mother country.

As to the subject itself there is no doubt that there are some excrescences that should be lopped off, abuses that should be rectified and improvements made. At the same time we doubt very much whether law can ever be made such a cheap, easy and expeditious means of securing justice as some sanguine persons seem to expect. These persons of course belong to the laity, who so commonly receive wrong impressions from, and are put on the wrong track by, writers for the daily papers, who from want of training have only a dim appreciation of what is wrong, and have absolutely no knowledge of how the wrong can best be remedied.

Another wrong impression, which is part of their cheap and

misleading literature, is the assertion that lawyers are enemies of law reform. Nothing could be farther from the truth. As our English namesake said in a recent issue: "Of all the popular notions concerning the legal profession probably none is more fallacious than the assumption that lawyers are the persistent opponents of law reform. As a matter of fact all the great reforms in legal procedure have been initiated and carried on by lawyers." This is as true in Canada as it is in England.

Some of the matters which require the aid of the legislature are:—The lessening the number of appeals, and this is the matter of most moment and most difficult of solution. The suggestions in connection with this are numerous, and none of them very satisfactory.—Making provisions whereby there shall be as little block in business as may be; possibly by reducing the volume of business in the High Court and giving more work to the county judges, by increasing their jurisdiction or otherwise.—Doing away with the present system of bills of costs; that most unsatisfactory mode of arriving at what a lawyer should receive for his services; inequitable and insufficient to the practitioners, irritating to the client, and giving large opportunities for the penny-a-liner to jeer and joke about.

There is another matter to which we have frequently called attention, namely, the most objectionable, and to solicitors the utterly unfair system by which litigants and lawyers are compelled to act as tax gatherers for the Government to provide salaries for Court officials or to swell the public revenue. As we said on a former occasion the disbursements for fees in every bill of costs form a large portion of the whole; and the opprobrium attaching to a lawyer's bill is largely due to the fact that in it are included disbursements which ought rather to appear in the public accounts. Another subject has been suggested as worthy of discussion, viz., the appointment of a practice judge so that there may be uniformity in procedure.

The resolution of the Attorney-General reads as follows:—

"That in the opinion of this House, with a view to the more prompt and satisfactory administration of justice in civil matters and the assessing of the cost thereof, it is expedient:—

"That there should be but one Appellate Court for the Province.

"That all the judges of the Supreme Court of Judicature for Ontario should constitute the Appellate Court.

"That the Appellate Court should sit in divisions, the members of which should be permanently assigned to them or chosen from time to time by the judges from among themselves.

"That the divisions should consist of five members, four of whom should be a quorum, except in election cases and cases in which constitutional questions arise, for which five members should sit, and except in appeals from inferior Courts, for the hearing of which three judges should form a quorum.

"That the decision of the Court of Appeal should be final in all cases except where (a) constitutional questions arise, or (b) questions in which the construction or application of a statute of Canada are involved, or (c) the action is between a resident of Ontario and a person residing out of the Province.

"That the appeal of right to the Judicial Committee of the Imperial Privy Council should be abolished, and the prerogative right of granting leave to appeal to that tribunal, if retained, should be limited to cases in which large amounts are involved or important questions of general interest arise.

"That in matters of mere practice, the decision of a judge of the Supreme Court, whether on appeal or a judge of first instance, should be final.

"That provision be made to regulate examinations for discovery to prevent the excessive costs that are often incident to such examinations, and the undue prolongation of such examinations.

"That the County and District Courts shall have jurisdiction in all actions, whatever may be their nature or the amount involved in both parties' consent.

"That the ordinary jurisdiction of the County and District Courts should be increased.

"That communications should be had with the Imperial and Dominion Governments with the view to legislation by the Imperial and Canadian Parliaments as to such of the foregoing matters as are not within the legislative authority of the Province."

These matters will require much thought and mature consideration. We would only at present refer to two of the proposals. It is suggested that the appellate Court of the Province

should consist of all the judges of the Supreme Court of Judicature. This follows the constitution of the old Court of Error and Appeal as constituted in 1849, when the Courts of Chancery and Common Pleas were organized. It was apparently not found to work satisfactorily and the Appellate Court finally took the form it now has, as a distinct and substantive Court. There is of course much to be said on both sides of this question; but at present we are not prepared to agree with the Attorney-General's resolution in that respect.

As to the suggestion that the present right of appeal to the Judicial Committee of the Privy Council should be abolished, or largely so, as set forth in the resolution, we doubt the wisdom of the change. Much has been written about this in the lay press and much said on the subject which has not been characterized by either calm judgment or due recognition of the constitution and the future of the British Empire.

This suggestion was much in evidence on a recent occasion, in some of the daily papers, mainly because the judges of the Judicial Committee (very properly as most lawyers seemed to think) declined to agree with our Court of Appeal as to the construction of a certain agreement; the writer alleging that the finding was to be accounted for because judges in England "could not be familiar with the practice and temper of the parties to the agreement." In fact they should, in the view of this writer, have based their judgment not on the words used by the parties, but on some supposed popular sentiment or local prejudice which of course was not, and could not have been brought before any Court in such a contention.

Speaking generally it may be said that it is desirable that all unnecessary procedure and useless and expensive appeals should be done away with. That any changes in procedure which seem to be desirable should be as far as possible along the lines laid down by English legislation, which has produced what is perhaps the simplest and most modern system in existence, and which for reasons of convenience it is desirable that ours should conform to it. Lastly that it is most desirable that whatever is

done should be a complete and well considered measure, so that the pernicious tinkering of statutes so common in this Province may be reduced to a minimum.

We may quote in conclusion the words of Sir William Mulock who on a recent public occasion said:—"The work of law reform is not to be undertaken by the man on the street. It is the duty of the Bar at all times to aid in such work but in so assisting we must not be stampeded by every cry from the laity; soundness and right of good judgment must be our guiding lights." These are wise and timely words coming from one who was recently in the thick of the political battle and may give food for profitable reflection to the legislators upon whom will shortly be laid the duty of dealing with this most important and highly technical subject.

PAYING DIVIDENDS OUT OF CAPITAL.

It is trite law that dividends cannot be paid out of capital. But this statement does not exhaust the subject. What is capital in a legal sense? And how far can the Courts interfere with the decision of the directors as to what sums are properly charged to capital, so as to leave free sufficient income to pay dividends?

This latter question arose first in *Bloxam v. Metropolitan Railway Co.* (1868) L.R. 3 Ch. 337, in which the Court laid it down that the payment of dividends will be restrained in cases of doubt as if paid they are irrecoverable from the shareholders. The discussion in the judgment is important as pointing out that the charging to capital of interest on debentures may be proper if the debentures were those of a separate company, i.e., guaranteed as to principal and interest by the operating company but not so if the undertakings were merged and, as a whole, were producing an income.

Again in *Stringer's case* (1869) L.R. 4 Ch. 475, the directors of the company were held justified in taking the facts as they actually stood and in declaring a dividend out of realized

profits, though some of the ships were lost—(the company was formed to run the blockade during the Civil War in the United States)—and the assets shewn depended for their value upon possible realization in an extremely hazardous business. In fact the Courts assert that if they laid down the rule that there must be actually cash in hand or at the bankers of the company to the full amount of the dividend declared, that rule would be inconsistent with the custom of the companies, and at variance with mercantile usage. The principle accepted is that in the absence of fraudulent intent the Court ought not to be astute in searching out minute errors in calculation in accounts honestly made out and openly declared.

In *Rance's case* (1870) L.R. 6 Ch. 104 the Court of Appeal, Sir Wm. James and Sir Geo. Mellish, L.JJ., discuss the duties of directors in declaring a dividend. In the first place a balance sheet is necessary, and if that is made out accurately and submitted, or even if the directors arrive at their conclusion by placing unfounded reliance upon the representations of their servants or actuaries, "the Court will not sit as a Court of appeal upon that conclusion, although it might afterwards be satisfactorily proved that there were a great many errors in the accounts which would not have occurred if they had been made out with greater strictness or with more scrutinising care."

In the view of the Court no proper balance sheet was made out, in that no proper provision was made for risks (in the insurance sense) in regard to money received from another company for whom they had guaranteed certain policies.

In *re Oxford Benefit Building & Investment Society* (1886) L.R. 35 C.D. 502, the directors never submitted an account of income or expenditure nor any profit or loss account. But they paid dividends out of estimated profits and out of whatever money they happened to have in hand, without attempting to form a reserve fund or to provide for possible bad debts, losses or expenses and without ascertaining what profits were actually realized or out of what fund the dividends were actually paid.

The company were only entitled to pay dividends out of

"realized profits." Kay, J., held that profits were not "realized" by estimating the value, for the time being, of the instalments of principal and interest remaining unpaid by each mortgagor. He decides that realized profits out of which dividends can be paid must be either cash in hand or "rendered tangible for the purpose of division." In *Leeds Estate Co. v. Shepherd* (1887) 36 C.D. 787 Stirling, J., held that the articles of Association warranted the payment of dividends out of estimated profits arrived at upon estimates of the company's accounts, and he indicates that directors may properly act upon valuations of their properties in proposing a dividend. His reference to *Stringer's case* (ante) at pp. 801-2 is liable to misconstruction. The question in that case was as to dividends during the company's career and not after its complete winding-up. The quotation from the remarks of Gifford, L.J., that dividends might be paid "out of profits, although those profits were not profits in hand" refers obviously to profits in hand as meaning those ascertained after all the company's operations were concluded (see page 491) because the article mentioned as authorizing the payment of dividends (page 490) expressly says "as soon and as often as the profits of the company in hand are sufficient," i.e., in hand from time to time upon a proper estimate of the company's accounts. In *re Sharpe* (1892) 1 Ch. 154 emphasis is put by North, J., upon the necessity of directors having a proper profit and loss account made out and in seeing that that account contains what is essential for the purpose of ascertaining whether or not there is a profit. In that case interest had been paid upon the amounts paid up on the shares, and the Court of Appeal, while thinking that it was doubtful whether, under the articles, interest must be paid only out of profits, held that payment of interest when there were no profits was a misapplication of the assets of the company and was ultra vires, i.e., an act beyond any power which the company could confer upon its directors. It was in effect a return of part of the capital to the shareholders and authorization in the articles of Association to do so would be invalid. This

view is founded upon *Trevor v. Whitworth* (1887) 12 A.C. 409 where Lord Herschell says (p. 415): "The capital may be diminished by expenditure upon and reasonably incidental to all the objects specified. A part of it may be lost in carrying on business operations authorized. Of this all persons trusting the company are aware and take the risk. But I think they have a right to rely, and were intended by the Legislature to have a right to rely, on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders."

In *Bolton v. Natal Land and Colonization Company* (1892) 2 Ch. 124, and in *Wilmer v. McNamara* (1895) 2 Ch. 245 an injunction was refused even where a bona fide dispute existed as to the proper amount to be charged for depreciation against the year's profits when the directors had honestly exercised their judgment.

The case of *Burland v. Earle* (1902) A.C. 83 determines some practical questions. It is there held that, under the Letters Patent granted under the old Companies Act, a company (1) is not bound to divide all its profits on each occasion among its shareholders, (2) can legally reserve any portion of it at its own discretion, (3) may invest such sum as may be selected by the directors subject to the control of a general meeting but not restricted to trustee investments, (4) and may invest in the name of a sole trustee. These statements of law are not confined to the case of companies under the Act referred to, but are laid down as applicable generally to joint stock companies in the absence of special restrictions by charter.

These are matters of internal management and as stated by Lord Davey "it is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers and in fact has no jurisdiction to do so."

Turning now to the question of how profits are to be determined and how far capital, fixed or circulating, must be made up

or depreciation allowed for before profits are available for dividend, the following cases are to be considered.

In *Re Ebbw Vale Steel Iron & Coal Co* (1877) 4 C.D. 827 Jessel, M.R., inclines to the opinion that a limited company could not pay dividends unless its paid-up capital were kept up.

In *Bouch v. Sproule* (1887) 12 A.C. 385 the use as capital of accumulated profits by companies having no power to increase their capital was considered. It was there determined, following *Irving v. Houstoun*, 4 Paton Sc. Ap. 521, that any distribution from those accumulated profits must be taken, as between a remainderman and life tenant, as a distribution of capital. But as stated by Lord Herschell this determination in no way affects the power of a company, which has the right to increase its capital and to appropriate its profits to such increase, to distribute these profits as dividends when it has not appropriated them to capital.

Lee v. Neuchatel Asphalte Company (1889) 41 C.D. 1 contains some very interesting views as to capital. It was there pointed out that capital may mean either the share capital or the assets of the company in which that share capital is invested. While, therefore, the share capital cannot be decreased except as provided by the Companies Act, the value of the assets may fall and it is not incumbent on the company to maintain the value of the assets at the original figure before it can pay dividends. Where property is taken over for shares and the shares are thereby paid up it is obvious that the property so taken may increase or diminish in value. Accretions to capital are capital and not divisible profits. In determining profits, according to Lopes, L.J., (p. 27) accretions to and diminutions of the capital are to be disregarded. And the share capital, paid in in cash, may, according to Lindley, L.J., (p. 22) be sunk in getting a business, e.g., a company to start a daily newspaper may expend £250,000 before the receipts from sales and advertisements equal the current expenses. This expenditure is proper if it is in accordance with the articles of Association or charter of the company. Cotton, L.J., (p. 17) endorses this view. Lindley,

L.J., points out three conclusions from a consideration of the Companies Act. First, that capital is not required to be made up if lost, second, that it is not provided that a company shall be wound up if the capital is lost, because if the debts are paid the company may go on and divide profits if the shareholders are satisfied, and third, that there is nothing in the Companies Act defining what must be considered as capital and what as profits. Of course if the charter requires provision for reparation or depreciation (as in *Davison v. Gillies* (1879) 16 C.D. 347 n.) or that the dividends are to come out of the profits of the year (as in *Dent v. London Tramways Co.* (1880) 16 C.D. 344), then those are proper charges to be made and must be made before profits can be ascertained for division. It must be observed, however, that in the latter case, which the Lords Justices say was decided solely upon the articles of Association, Jessel, M.R., expressly decides that "profits for the year" mean the surplus in receipts, after paying expenses and "restoring the capital to the position it was in on the 1st of January of that year."

This case forms the starting point for a line of cases referred to below, which are criticised in Palmer's Company Law, 4th ed., p. 178, as laying down conclusions which the author considers remarkable. And in *Dovey v. Cory* (1901) A.C. 477, Lord Halsbury (pp. 482, 486), Lord Macnaghten (p. 487), and Lord Davey (pp. 493-4), expressly reserve their opinion upon the reasoning of the Court of Appeal in regard to the method of arriving at profits until a concrete case came before them for their decision.

And in a case noted below, *Bond v. Barrow Hæmatite Co.* (1902) 1 Ch. 353, Farwell, J., considers the decision of *Lee v. Neuchatel Asphalte Co.* as confined to some and not all companies having wasting assets.

Bolton v. Natal Land Company (1892) 2 Ch. 124 is authority for the proposition that if profits are made in any one year, then, notwithstanding the depreciation of the company's assets and consequent loss of part of its share capital, those profits may be divided without providing for depreciation even although

in former years the company has charged depreciation of assets against profits.

This case is noted by Lindley, L.J., in *Verner v. General, etc., Trust* (1894) 2 Ch. at p. 267, as depending upon the fact that there is no law which compels limited companies in all cases to recoup losses shewn by capital account out of the receipts shewn in the profit and loss account.

In *Lubbock v. British Bank of South America* (1892) 2 Ch. 198, Chitty, J., held that a sum of £205,000 profit remaining after a sale of part of its business in Brazil by a banking company, after deducting the paid-up capital and other incidental expenses was profits on capital and not capital. His argument was that where a company was a trading company everything made by the sale of its stock in trade was, after deducting the share capital, clear profit and that the capital to be regarded is the capital according to the Companies Act and not the things for the time being representing the capital in the sense of being things in which the capital has been laid out. He distinguishes *Lee v. Neuchatel Asphalte Co.* in that that company was formed to work a wasting property and hence was, apparently, not bound to keep up the value of its share capital before dividing profits.

In *Verner v. General and Commercial Investment Trust* (1894) 2 Ch. 239, one of the abstract questions discussed in *Lee v. Neuchatel Asphalte Company* (1889) 41 C.D. 1, came up in concrete form before Stirling, J., and the Court of Appeal. The case is put thus very tersely by Stirling, J., (at p. 245): "There being a loss in respect of capital of not less than £75,000 and a gain in respect of receipts over expenditure of £23,000, can a dividend be declared?" Lindley, L.J., having stated that capital means, in contrast to dividends or profits, money subscribed pursuant to the memorandum of Association or what is represented by that money, asserts (p. 266) that although there is nothing in the statutes requiring even a limited company to keep up its capital, and there is no prohibition against payment of dividends out of any other of the company's assets, it does not follow that dividends may be lawfully paid out of other

assets regardless of the debts and liabilities of the company. He then cites three instances of improper payments, (1) out of receipts without deducting expenses, (2) out of borrowed money, and (3) out of the income produced by the consumption of what he calls "circulating capital." Kay, L.J., alludes to the difference between a company making its profits on the purchase and sale of stocks, etc., and a company such as the one he was dealing with which had merely the right to invest and whose profit was only the interest on such investments.

In the one case the capital must be kept intact before profit can be shewn, in the other it may be lost by depreciation in the investments, which, however, may yield a yearly profit, distributable in dividends.

In *Wilmer v. McNamara* (1895) 2 Ch. 245 Stirling, J., followed the *Neuchatel and Verner cases* in the case of a company carrying on business of a carrier, the loss of capital not having occurred from the company receiving a price less than it originally gave for a portion of its assets. Depreciation of good will is treated by the learned judge as a loss of fixed capital. In *Re London and General Bank*, No. 2 (1895) 2 Ch. 673, dividends paid out of borrowed money were held to be improperly paid.

Vaughan Williams, J., in *Re Kingston Cotton Mill Co.*, No. 2 (1896) 1 Ch. 331, follows the *Neuchatel and Verner cases* and holds that a trading company as well as an investment company and a company formed to work a necessarily wasting property, may lawfully pay a dividend out of current profits without setting aside a sum sufficient to cover depreciation in the value of fixed capital.

Re National Bank of Wales, Limited (1899) 2 Ch. 629 is an interesting case upon the charging up of bad debts of successive years. Wright, J., considers that as bad debts had wiped out the paid-up capital, leaving a deficiency of £41,000, he was justified in holding that the dividends in question were paid out of capital. His view, however, was not adopted by the Court of Appeal. Lindley, M.R., while admitting the fact that omitting

to write off bad debts year by year would inevitably lead to disaster, contends that such a course must not be confounded with paying dividends out of capital. He says that what losses can be charged to capital and what to income must be left to business men to determine. All debts cannot be charged to capital, but there is no hard and fast rule on the subject. He explains what is meant by circulating capital as being the money employed in earning returns and this must first be deducted from the returns in order to ascertain profits. The result of his view is that leaving bad debts as a charge against capital and thus diminishing it yearly does not, in law, affect the question of whether profit, i.e., the excess of income over expenditure is or is not, in fact, made, and that a banking company is not bound to keep its capital intact, as such a company lends its capital and may, therefore, lose it. And in appeal as stated above, the House of Lords expressly decline to assent to all the propositions laid down by the Court of Appeal in this case.

In the case of *Bosanquet v. St. John del Rey* (1897) 77 L.T. 207, the view of the Court of Appeal was followed.

Cozens-Hardy, J., in *Re Barrow Haematite Steel Co.* (1900) 2 Ch. 846, refers to the *Neuchatel* and *Verner* cases as establishing that a trading profit may be applied in payment of dividends, notwithstanding a depreciation in the fixed capital of the company.

In *Bond v. Barrow, Haematite Co.* (1902) 1 Ch. 353 the company had bought collieries and mines and erected blast furnaces and cottages. By the surrender of certain leases the pulling down of blast furnaces and the sale of cottages, a loss had been incurred. Farwell, J., held that these assets were "circulating capital" and must be made good before dividends were paid, and illustrates his view by saying that if a company had bought out of capital the last two or three years of a valuable patent, they would, in his view, be bound to replace that capital before dividing the receipts as profits.

In *Foster v. New Trinidad* (1901) 1 Ch. 208 Byrne, J., deals with a question said to be involved in *Lubbock v. British Bank*

of *South America* (ante), which dealt with the distribution, as profits, of a balance on the sale of part of the bank's assets after deducting the capital and expenses.

The defendants, in this case, bought out the assets of an old company and unexpectedly realized upon one which was considered valueless. Byrne, J., while expressing the view that it was capital, as being part of the capital assets of the old company (a result which, by the way, does not seem to follow when it is being dealt with as purchased asset of the new, and not as a capital asset of the old company) did not finally determine the point. His view was that as an appreciation in the total value of capital assets, if realized by sale or getting in of some portion of such assets, may in a proper case be treated as available for the purpose of dividend, this windfall might be taken into the accounts for the year, but could not be treated as available for dividend without reference to the whole accounts, fairly taken, capital as well as profit and loss.

But since the House of Lords, in that case, reserved its opinion upon the question of the replacement of capital before profits are divided the reasoning in some of the cases given above has been canvassed.

The authors of *Lindley on Companies*, 6th ed. (1902) p. 600, regard the question as one on which it is at present impossible to lay down any general principle which will apply to all cases. They regard the expressions of opinion in the *Verner case* as requiring caution in their application and as needing, possibly, modification where a definite portion of the company's fixed capital has been lost.

In the *Encyclopedia of the Laws of England*, p. 201, it is said that while a company is not bound to carry on business in perpetuity, yet the so-called profits in case of a company working wasting property are profits only in a conventional sense, that is, are agreed between the shareholders to be treated as such and are not profits in the ordinary sense, and that it is difficult to see why dividends out of such conventional profits are not really a return of capital to the shareholders. It is to be ob-

served that in some of the later cases the question is treated as if the judges were not wholly persuaded by the authority which they were bound to follow. For example, Vaughan Williams, J., in *Re Kingston Cotton Mills Co.*, No. 2 (ante) does not profess to express an opinion upon the principle of the *Neuchatel and Verner cases*, and Farwell and Stirling, JJ., cannot be said to have fully accepted it.

In Buckley on Joint Stock Companies, 8th ed., 1902, p. 584, et seq., the two leading cases and others are analysed and explained. The author emphasizes the fact that all the cases are reconcilable upon the principle that approval or disapproval depended upon the provisions of the articles of Association.

If companies are authorized by their charter to acquire and work a wasting property, then if they sink their capital in that class of property and make other property by working it, the depreciation being incident to the exercise of their powers is not necessarily a charge on revenue account, but may by their charter be thrown on capital. The destruction of the company's capital is within its objects and is therefore legitimate. If the company is authorized to make investments, which it does, and these depreciate, the same rule applies. If this be the real test the cases of *Bolton v. Natal Land Co.* (1892) 2 Ch. 124; *Wilmer v. McNamara* (1895) 2 Ch. 245, *Re Kingston Cotton Mills Co.*, No. 2 (1896) 1 Ch. 331, and *Re Barrow Haematite Steel Co.* (1900) 2 Ch. 846 may be said to be consistent with it. The difficulty is apparent, however, if the capital is not fixed but is circulating, because that capital must be first secured before any profit can be said to be earned.

If a bank lend its capital and lose it, is it fixed or circulating capital? Depreciation is a deduction from the value of property remaining in use and is properly applied to fixed capital. But how does it differ in principle from losses on investments or losses on circulating capital?

It must be admitted as Lord Halsbury says in *Dovey v. Cory*, that the question of what is capital and what are profits is difficult and perhaps insoluble. To be quite safe capital should be re-

placed before profits are paid. But in all cases circulating capital must be made good and in the opinion of some of the most eminent judges fixed capital must also be made up. The extreme difficulty of laying down any rule may be seen by comparing the definitions of "circulating capital." John Stuart Mill and Prof. Marshall distinguish "circulating capital," which fulfils the whole of its office in the production in which it is engaged by a single use, from fixed capital which exists in a durable shape and the return from which is spread over a period of corresponding duration. Buckley defines circulating capital as property acquired or produced with a view to resale or sale at a profit, and Lord Lindley considers it equivalent to any money employed in earning returns.

In Canada it may be said that some of the reasoning in the cases referred to is not applicable. The words in the Canada Companies Act and in the Ontario Companies Act are not the same as those in the English Companies Act. By the latter dividends must not be paid out of profits. Hence the question has continually arisen, what are "profits"? In this country no dividend can be paid "which renders the company insolvent or impairs the capital stock thereof" (Canada), and no dividend can be paid "which renders the company insolvent or diminishes the capital thereof" (Ontario). It seems reasonably clear that if by any loss of fixed capital the company would be rendered insolvent, unless enough were carried from revenue account to replace it, no dividend could be paid till the capital was restored sufficiently to make the company solvent. But it is also obvious that if fixed capital be lost but the company is not insolvent, the payment of a dividend out of profits on the year's business will not impair or diminish the capital stock. But in the case of circulating capital, unless that is made good, a payment may render the company insolvent or may diminish its capital.

Insolvency or impairment of capital are made the tests, not the actuality of realized profits, and it would seem that the line of cases beginning with *Lubbock v. British Bank of South America*, 1892, 2 Ch. 198, in which the position of accretions to

capital are discussed, would have no bearing on Canadian questions. But the general principles laid down in the English cases may very well be adopted by business men and are applicable to many concerns where both fixed and circulating capital enter into the balance sheet. Profits are defined by a learned text writer as the credit balance of a profit and loss account, properly prepared, having regard to the definition of the business in the articles of Association or charter and it is easy to see what difficulties lurk in the words "properly prepared."

FRANK E. HODGINS.

KING'S COUNSEL IN ONTARIO.

We almost feel that we ought to apologise for referring again to this unsavory matter, but we do so in connection with the legislation on that subject, which stands in a somewhat peculiar position, and which has not as yet been discussed.

In 1897 an Act was passed limiting the number of these appointments to five in one year or twenty in any four years. There were some limited exceptions, which, however, are not material at present. It was also provided that no one who was not of at least ten years' attending at the Bar of Ontario, should be appointed. By another section the appointments might all be made at one time, and partly at another time, during the four years. Then comes an enactment that "This Act shall not come into force until a day to be named by the Lieutenant-Governor by his proclamation." This statute now finds its place in R.O.S. c. 173, s. 7, which also covers certain rules as to precedence, etc.

So it is that for nearly eleven years this enactment has been on the statute book, but has not been brought into force by reason of no proclamation having been made. It may here be suggested that the legislature then considered the provisions of the Act desirable and proper. If any succeeding House thought otherwise the proper procedure would have been to have re-

pealed the Act and not leave it hanging in mid air like Mahomet's coffin—to be used or not as political exigency might require.

The memorandum published by the Government with the last batch of K.C.'s in effect declares that it was necessary for the party now in power to "even up" with their predecessors. This desirable end having now been obtained we presume the proclamation will shortly be made, and the statute brought into force. But it should have been in force on the day it was assented to, April 13, 1897. The fact of both Governments having played fast and loose with a matter affecting the honour and standing of the profession is worthy of the severe criticism which it has called forth. It is unnecessary to refer to the reasonableness of these criticisms or to speak of them in detail. The profession can judge of all that as well as we can.

One of our correspondents, in writing an indignant protest against the list, seems to think that it is useless advocating the abolition of the distinction and sarcastically remarks, "A counsel in large practice actually needs this precedence in Court, but happily the majority of the new appointees are not in his way, because they have no business." We agree that the doing away with these appointments is not within the range of practical politics for obvious reasons; and from past experience we can scarcely venture to hope that any Government, however strong, will do what really ought to be done in the matter, viz., give the power of appointment to say, the Chief Justice of Ontario, or, if preferred, the Chief Justices of the various Divisions of the High Court. Appointments by him or them would be marks of deserved professional distinction; but the majority of the appointments recently made are simply indicative that the recipients have deserved well of their party in matters outside their profession.

It is interesting to notice that during the month of December last that eminent jurist, Lord Halsbury, ex-Lord Chancellor of England, sat in the Court of Appeal during the absence of Lord Justice Vaughan Williams on the Welsh Church Commission. Lord Halsbury is now in his eighty-third year.

Correspondence.

Toronto, Ont., Feb. 5th, 1908.

Editor, CANADA LAW JOURNAL:—

DEAR SIR,—We are told that we are to expect legal reform as a special feature of the coming session of the Ontario Legislature. There is a very small point which has just come to my notice and which I should think might well be considered by the powers that be. Our statutes provide for a certain priority of wages in the case of assignments for the benefit of creditors, in winding-up proceedings, over execution creditors, on attachment against absconding debtors, and on administration of estates. But no priority is provided for in the case of distress by a landlord.

The case that is troubling me is one of a poor stenographer whose employer has been distrained on for rent, and who has received no salary for two weeks, and now finds herself without a remedy as the goods distrained are barely sufficient to pay the rent. I can conceive no earthly reason why landlords who may be presumed to be by no means among the less well-to-do classes should be alone able to exercise their special and peculiar privilege of distress in entire disregard of wages due to employees of the lessee, against whom they are distraining.

I suppose it is a last lingering trace of the good old times when landlords had it all their own way, but I should think that it might well be wiped out in Ontario, and claims of wage earners given the same priority as against claim for rent that they have in apparently all other cases.

Yours, etc.,

EQUITY.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

N.S.]

[Dec. 13, 1907.]

McMULLEN v. NOVA SCOTIA STEEL & COAL CO.

Negligence—Railways—Breach of statutory duty—Common employment—Employees' Liability Act.

Section 251 of the Railway Act of Nova Scotia provides that when a train is moving reversely in a city, town or village, the company shall station a person on the last car to warn persons standing on or crossing the track, of its approach, and provides a penalty for violation of such provision.

Held, that this enactment is for the protection of servants of the company standing on or crossing the track as well as of other persons.

M. was killed by a train, consisting of one engine and coal car, which was moving reversely in North Sydney. No person was stationed on the last car to give warning of its approach, and owing to frost the bell could not be heard. Evidence was given that on a train of the kind the conductor was supposed to act as brakeman and would have to be on the rear of the coal car to work the brakes, but when the car struck M., who was engaged at the time in keeping the track clear of snow, the conductor was in the cab of the engine.

Held, IDINGTON, J., dissenting, that the evidence was not sufficient to prove a system or rule of the company, by means of which the obligation imposed by section 251 of the Railway Act would be performed by the company; that the negligence therefore, was that of the company and not of its servants; and that the doctrine of common employment could not be invoked.

Held, per IDINGTON, J., that though the negligence was that of a fellow-servant of M., for which the company was not liable under the Fatal Injuries Act, they were guilty of common law

negligence, and plaintiffs could recover under the Employees' Liability Act. Appeal allowed with costs.

Mellish, K.C., for appellants. *Newcombe*, K.C., for respondents.

N.S.] NEW GLASGOW v. BROWN. [Dec. 13, 1907.

Municipal corporation—Sale of corporate property—Committee of council—Authority to sell—Ratification.

A committee of a municipal council cannot, unless authorized by the Council, sell corporate property, and if they do an action lies against them by the corporation for any loss incurred thereby.

Such illegal sale cannot be ratified by resolution of the council carried by the votes of the members of the committee.

Appeal allowed with costs.

Gregory, K.C., and *Mellish*, K.C., for appellants. *W. B. A. Ritchie*, K.C., for respondents.

Province of Ontario.

COURT OF APPEAL.

Full Court.] REX v. EDMONSTONE. [Dec. 13, 1907.

Criminal law—Indictment for robbery with violence and wounding—Finding "guilty of assault"—Interpretation of—New trial.

On the trial at the General Sessions of the Peace of an indictment charging two prisoners with robbery with violence, and wounding, on the jury bringing in a finding of "guilty of assault," the chairman questioned the county attorney as to its meaning, when the county attorney replied, "Assault as charged in the indictment." The chairman then asked the foreman, when he replied, "We mean inflicting the blow with a bottle as described, but not guilty of robbery," and on being questioned as to which prisoner, replied "Both," whereupon the chairman endorsed the verdict on the record as follows: "Guilty

of assault as charged, but not guilty of robbery," he so interpreting the finding.

Held, that the verdict was not properly interpreted and acted upon by the chairman and was not rightly recorded, and a new trial was directed.

O'Reilly, for the prisoners. *Cartwright*, K.C., for the Crown.

Full Court.]

[Dec. 20, 1907.]

RE ONTARIO VOTERS' LISTS ACT, WEST YORK.

Parliament—Voters' lists—Appellant—Non-qualification of—Abandonment of appeal—Right to substitute new appellant.

By section 33 of the Ontario Voters' Lists Act R.S.O. 1897, c. 7, where an appellant "entitled to appeal" dies or abandons his appeal, or having been on the alphabetical list, etc., is afterwards found not to be entitled to be an appellant, the judge may "if he thinks proper," allow any other person who might have been an appellant to intervene and prosecute the appeal, on such terms as he may think fit. This Act was repealed by the present Voters' Lists Act, 7 Edw. VII. c. 4(O) s. 33, being the same as the repealed section, except that the words "entitled to appeal" are omitted, and the words "in his discretion" are substituted for the words "if he thinks proper." Section 15 defines an appellant namely, "any voter whose name is entered, or who is entitled to have his name entered on the list for the municipality."

Held, that the substituted section does not empower the judge—where an appellant, after the time for appealing has elapsed, abandons his appeal by reason of not being properly qualified—to allow a duly qualified appellant to be substituted.

Bayley, for Attorney-General. *Godfrey*, for certain voters.

Full Court.]

REX v. HILL.

[Dec. 23, 1907.]

Indian—Conviction for unlawfully practising medicine—Ontario Medical Act—Application to unenfranchised Indians—Constitutional law—Stated case.

The defendant, an unenfranchised treaty Indian, residing on a reserve, was convicted for having practised medicine for hire,

in Ontario, but not upon the reserve, without being registered pursuant to the provisions of the Ontario Medical Act, R.S.O. 1897, c. 176; and upon a case reserved by the convicting magistrate it was contended that that Act was *ultra vires* of the provincial legislature, because Indians of the class or having the status of the defendant are wards of the Dominion, and subject in all relations of life only to federal legislation, under section 91 (24) of the British North America Act.

Held, that the defendant was subject to the provisions of the Medical Act and was properly convicted.

Per OSLER, J.A.:—Parliament may remove an Indian from the scope of the provincial laws, but, to the extent to which it has not done so, he must in his dealings outside the reserve govern himself by the general law which applies there.

Semble, also, per OSLER, J.A., that the question was not one proper to be raised by means of a special case stated under R.S.O. 1897, c. 91, s. 5. The Medical Act does not in terms profess to be applicable to Indians, and the question was really whether it could be interpreted as applicable to them, not whether it was *ultra vires* if applicable to them.

J. B. Mackenzie, for defendant. *Curry, K.C.*, for informant.

HIGH COURT OF JUSTICE.

Boyd, C., Magee, J., Mabee, J.]

[Dec. 6, 1907.]

FOSTER v. ANDERSON.

Vendor and purchaser—Delay of vendor—Time of essence—Whether of contract or acceptance of offer—Deed to be prepared at vendor's expense—Effect of—Misrepresentation—Description—Statute of Frauds—Specific performance.

Where the non-completion of a contract for the sale of land within the time limited thereby was caused by the vendor, she was held to be precluded from insisting on the strict performance of the provision in that respect by the purchaser.

The contract consisted of an offer made by the purchaser, and its acceptance by the vendor, the offer containing the terms of the contemplated contract, amongst which was the provision

that "Time shall be of the essence of this offer": and that the deed should be "prepared at the expense of the vendor."

Quære, whether the limitation referred to the completion of the contract, or merely to the acceptance of the offer; and whether the provision as to the deed being prepared at the vendor's expense dispensed with the requirement of the general rule that the purchaser should prepare and tender the deed to the vendor.

Misrepresentation on the purchaser's part, and of there not being a sufficient description of the land within the Statute of Frauds, set up as defences by the vendor, were held not to have been established.

Decree for specific performance was directed.

Marsh, K.C., and *W. J. Clark*, for plaintiff. *Watson*, K.C., for defendant.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [Dec. 10, 1907.

KEECH v. TOWN OF SMITH'S FALLS.

Highway—Obstruction—Injury to traveller—Knowledge of danger—Negligence—Municipal corporation—Misfeasance or nonfeasance.

The mere fact that the plaintiff knew that a heap of dirt was standing upon a highway is not sufficient to disentitle him to recover damages from a municipal corporation, for personal injuries sustained by him owing to the heap having been negligently left there unguarded.

Gordon v. City of Belleville, 15 O.R. 26, and *Copeland v. Village of Blenheim*, 9 O.R. 19, followed.

It was argued that the municipal corporation in discharging their duty of cleaning the highway, had a right to cause the dirt to be raked into a heap, and that leaving it there unguarded was mere nonfeasance.

Held, that the doing of a lawful act in such a way as to endanger the safety of the public was misfeasance—the whole was one act and an unlawful act.

Rowe v. Corporation of Leeds and Grenville, 13 C.P. 515, and *Bull v. Mayor of Shoreditch*, 18 Times L.R. 171, 19 Times L.R. 64, followed.

Judgment of the County Court of Lanark affirmed.

Middleton, for defendants. *C. A. Moss*, for plaintiff.

Boyd, C., Magee, J., Mabee, J.]

[Jan. 9.

POW v. TOWNSHIP OF WEST OXFORD.

Highway—Nuisance—Obstruction—Usual travelled way—Electric railway tracks on highway—Contributory negligence—Fatal Accidents Act.

This was an appeal by the plaintiff from the judgment of Falconbridge, C.J.K.B. dismissing an action brought by the widow to recover damages for the death of her husband under the following circumstances:—The deceased was driving on a dark night on a highway on which had been constructed an electric car track. After crossing this track he got on the travelled road but coming upon some piles of gravel and large stones and the rough surface of a drain lately covered, he turned aside and again got on the track. After going on a short distance he apparently turned off the car track to go on to the travelled road. Probably in crossing the raised rail of the track which, in some places, was about a foot and a half above the road-bed, the deceased was thrown out and killed.

Held, 1. That on the evidence there was no contributory negligence.

2. Under the common law the public are entitled not only to free passage along the travelled part of the highway, but also to a free passage along any portion of it not in the use of another traveller.

3. Under our Municipal Law the local municipality are responsible for keeping in proper repair the travelled part of the road, but it is also liable for misfeasance or nonfeasance if it permits obstacles to be placed alongside of the travelled way which are dangerous to travellers, and any traveller suffering injury from coming in contact with such obstacles has right of action against the municipality for injury caused thereby.

4. The municipality having the power to control the construction of the electric railway tracks having failed to exercise any effective supervision was guilty of negligence.

5. As to the measure of damages. The deceased was making about \$500 or \$600 a year, and his widow depended upon him for support. It was considered that three years' earnings, say, \$1,800, would be a fair allowance for damages, together with costs.

Douglas, K.C., and W. P. McMullen, for plaintiff. Johnston, K.C., and G. F. Mahon, for defendants.

Trial.—Riddell, J.]

[Jan. 13.]

BRAZEAU v. CANADIAN PACIFIC RY. CO.

Railway—Passenger—Right to particular seat—Authority of conductor—Smoking car—Removal of passenger from seat taken by another and temporarily vacant—Assault—Rights of passengers—Damage—Costs.

The plaintiff brought an action for an assault upon him by a conductor of a train of the defendants, and for removing him from a certain seat in a car. A party of five gentlemen associated in business were travelling from Montreal to Ottawa on the defendants' railway, and had been sitting together in the smoking car conversing about matters of common interest. One of them, F., required to go to the lavatory, and left his seat. No baggage or clothing was left to indicate that he intended to return, though he did so intend. While he was in the lavatory the train stopped at a station, and the plaintiff got in. Coming into the car and seeing this vacant seat he went to take it; but before sitting down he was told that the seat belonged to another who was in the lavatory, and was asked to take another seat which was vacant. He, however, insisted on occupying the seat. Shortly afterwards F. returned and wanted his seat. He pointed out to the plaintiff that there was another vacant seat, and it was explained that the five gentlemen were travelling together, but he refused to vacate, and appeal was made to the conductor who told the plaintiff he must give up the seat. The plaintiff remaining obdurate, the conductor finally took him by his coat and gently lifting him from the chair, placed him in the passage way, and pointed him to a vacant chair.

Held, 1. A railway company is liable for the acts of its conductors while they act in the course of their employment, however improper such acts may be.

2. It makes no difference that the plaintiff acted rather to annoy the person whom he deprived of his seat and his friends than for any other reason, that the law cannot consider the object or purpose of the action of any person who is acting within his rights.

3. That the custom of putting smoking cars on trains, though a concession to the smoker and intended for his comfort, is not compulsory on the company.

4. The company whether at the common law or by statute are bound—holding themselves out as common carriers—to find

room for all who offer themselves as passengers and in general to find seats for all passengers, but there is no right for a passenger to occupy any particular seat unless the seats are numbered and a ticket is bought therefor.

5. The conductor was within his rights in determining that the plaintiff should not occupy the seat of which he had taken possession; that F.'s retiring for a temporary purpose was not an abandonment of the seat, and that as the action thus failed upon the law it was dismissed with costs.

A. Lemieux, for plaintiff. W. H. Curle, for defendants.

Riddell, J.]

SCHLUND v. FOSTER.

[Jan. 18.

Discontinuance—Terms—No action to be brought in any Court for same cause.

Plaintiff's writ was issued Dec. 22, 1906, and upon the same day the statement of claim was filed in which the plaintiff was described as "at present residing at the City of Toronto." Copies of the writ and claim were served on the defendant Jan. 7, 1907. The plaintiff swore to his desire to have the case tried by jury and it was duly set down for trial for the Toronto winter assizes. In the meantime the plaintiff had taken advantage of the fact that the defendant was passing through Chicago to issue process out of the Supreme Court of Cook County in an action of assumpsit, and the defendant was served when passing through that city. It was admitted that the two actions were upon one and the same cause. The plaintiff eventually served notice of discontinuance and the defendant serving notice for an order setting aside the motion of discontinuance the plaintiff countered by serving notice that upon the return of this notice he would move for an order allowing him to discontinue the action on payment of costs, or for an order confirming the notice of discontinuance already filed.

Held, that the plaintiff could not discontinue except upon terms, that no action should be brought in this or any other Court, domestic or foreign, upon the same ground of action, and that no further proceedings be taken in the action in Chicago, or any other action already brought, and that the plaintiff pay the costs: see *Black v. Barry* (1887) which was a judgment by

Mr. Dalton, K.C., Master-in-Chambers, (not reported) and *Fox v. Star Co.* (1900) A.C. 19.

W. A. Ferguson, for plaintiff. *Blackstock*, K.C., for defendant.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] *RODGER v. MINUDIE COAL CO.* [Dec. 14, 1907.]

Railway company—Tolls for carriage of goods—Non-approval of by-law fixing rates—Right to recover—Claim of refund disallowed—Reasonableness of rate—Amendment allowed to raise question—New trial.

Action by plaintiff as liquidator of the Canada Coal and Railway Co., for an amount claimed for car rental, etc. Defendant pleaded by way of offset, a claim for re-payment of overcharges for the carriage of coal made by the company in liquidation.

The evidence shewed that the Joggins Railway Company, predecessors in title of the Canada Company, passed a by-law which was approved by the Governor in Council fixing the rate per ton for the carriage of coal over their line and that the Canada Company subsequently passed a by-law increasing the rate, and that the defendant company were charged toll as fixed by the latter by-law, although it had never received a sanction of the Governor in Council, and they claimed to be entitled to recover the difference between the two amounts.

Held, 1. The by-law passed by the Joggins Company relating to the tolls to be taken by that company was not a regulation affecting the road and running with the property, and was not binding upon their successors in title.

2. The Canada Company was not liable to refund moneys paid to them for the carriage of goods simply because they had failed to secure the approval of the Governor in Council to the by-law fixing the rates. The trial judge should, however, have allowed an amendment applied for on the trial intended to raise the question of the reasonableness of the rates taken, and that

the appeal must be allowed and the new trial ordered on this ground.

Ralston, for appellant. *A. A. Mackay*, for respondent.

Full Court.]

[Jan. 14.

THE KING EX REL. JOHNSTON v. JUDGE OF THE COUNTY COURT
FOR DISTRICT NO. 5.

Canada Temperance Act—Appeal from conviction—Computation of time—Code section 750 (a)—Mandamus to judge of County Court.

The relator, who was convicted of a third offence against the Canada Temperance Act, appealed to the judge of the County Court for District No. 5, who declined to hear the appeal on the ground that it was too late. The conviction was made in the County of Pictou on Oct. 21, and the next sittings of the Court, thereafter, were at Amherst, in the County of Cumberland, on Nov. 5, and the next at Pictou in the County of Pictou, on Dec. 3.

The Code, section 750 (a), requires the appeal in such case to be taken "to the next sittings of the Court if the conviction is made more than 14 days before such sittings."

Held, per MEAGHER, J., TOWNSHEND, C.J., concurring, that words "more than" were the equivalent of "not less than," and that in the computation of time within which the appeal was to be taken the day of conviction must be excluded, and as so read the conviction or order was not made more than 14 days before the sittings of the Court at Amherst the appeal was properly taken to the next sittings at Pictou, and a mandamus should go to the judge of the Court requiring him to hear the appeal.

Also, that in the Province of Nova Scotia, appeals from summary convictions under the Criminal Code must be to the next sittings of the County Court in the district and not in the county.

Per LONGLEY, J., that the appeal must be to the next sittings in the county.

Per RUSSELL, J., dissenting, that the appeal must be taken to the next sittings of the Court in the district, and that section 750(a) of the Code must be construed to mean "just 14 days."

J. J. Power, K.C., for relator. *H. Mellish*, K.C., for the judge. *W. McDonald*, for the inspector.

Full Court.]

STEPHEN v. FLEMING.

[Jan. 23.]

Municipal election—Recount—Appeal to County Court—Payment for dinners—Marking ballot paper.

Petitioner, one of the candidates at a municipal election, was declared elected by a majority of one vote over respondent. On a recount, three of the ballots which had been counted for petitioner by the presiding officer, were thrown out and the seat awarded to respondent. On appeal to the judge of the County Court for District No. 1, the ballots thrown out by the municipal clerk were allowed, and petitioner declared elected. On further appeal,

Held, 1. The declaration of the municipal clerk was not final, but was simply the return that the presiding officer should have made had he counted the ballots correctly, and in its effect did not differ from the return of that officer, and that there was nothing in the Municipal Act, R.S., c. 70, s. 64, which deprived the County Court of its jurisdiction to try election petitions conferred by the Municipal and Town Elections Act, R.S., c. 72.

2. The petition in the case sufficiently complied with s. 7, sub-s. (a) of c. 72, if it complained of an undue return and set forth facts sufficient, if true, to shew that such was the case.

3. The fact that petitioner was shewn to have paid for certain dinners was not a corrupt practice for which he should be disqualified, where it appeared clearly from the evidence that the payment was not made in view of any previous arrangement or agreement, but after the electors had voted, and without any intention of influencing them.

The ballot papers used at the election in question contained the names of three candidates separated by a line printed between each name and with a double line at the top and bottom of the paper.

One of the ballots counted for petitioner by the county judge was marked with a cross below the name of the candidate and below the lines printed at the foot of the paper.

Held, per Russell and Longley, JJ., Townshend, C.J., and Meagher, J., contra, that the lines printed at the top and bottom of the paper were immaterial and that the mark, although made below the lines at the foot of the paper was within the division

of the candidate for whom the voter intended to vote within the meaning of s. 46 of c. 70 R.S.

W. B. A. Ritchie, K.C., for appellant. Cluny, for respondent.

NOTE.—The decision of Meagher, J., in the above case is understood to have been confined to the point last noted.

Full Court.]

[Jan. 25.

BELL v. INVERNESS COAL & RAILWAY CO.

Employers' Liability Act—Operation of coal mine—Liability of company for negligence of employee.

Under the system of operating the defendant company's coal mine, coal was brought to the surface by means of box cars, and at intervals what was termed a "rake of cars" was sent down to bring up men. In the latter case the rules of the company required the man in charge of the rake to give four raps upon the rope connecting the cars with the hoisting engine at the surface as a signal that men were on board, when the cars were raised at a much slower rate of speed than that employed in raising coal. The man in charge of the rake, in violation of the rules, gave only one rap upon the rope (the signal used when coal was being raised) and the cars being brought up at a great speed ran off the track, the accident resulting in the death of one man and serious injuries to another. In an action under the Employers' Liability Act, R.S. (1900) c. 179,

Held, affirming the judgment of the trial judge,

1. The case was within s. 3, sub-s. (e) of the Act relating to the negligence of persons in the service of the employer and having "charge or control of any points, signal—upon a railway, etc."

2. There was no such contributory negligence on the part of plaintiff in remaining upon the cars (there having been an opportunity of getting off at a stopping place) as would disentitle him to recover.

3. The principle *volenti non fit injuria* could not be invoked on behalf of the defendant company.

Mellish, K.C., for appellant. D. McNeil, for respondent.

Province of Manitoba.

KING'S BENCH.

Mathers, J.]

[Nov. 28, 1907.]

CANADA ELEVATOR CO. v. KAMINSKI.

Practice—Payment into Court—Condition sought to be imposed on plaintiff getting money out of Court.

The defendant paid into Court under Rule 530 of the King's Bench Act the sum of \$853 in satisfaction of a specified part of the plaintiff's cause of action and his pleading stated that he was "content that the same be paid out to the plaintiffs after payment of the defendant's costs of action."

Held, that the plaintiffs were entitled under Rule 532 to an order for payment of the money out to them free from the condition sought to be imposed by the defendant. Money cannot be paid into Court except under Rule 530 in satisfaction of the cause or part of the cause of action or one or more of the causes of action for which the plaintiff sues, and when it is so paid in there is nothing in any of the rules to enable a defendant to prevent the subsequent rules from operating, and under them the plaintiff is entitled to take it out in satisfaction of the cause of action for which it was paid in.

Wheeler v. United Telephone Co., 13 Q.B.D. 597, followed.
Galt, for plaintiffs. *Dennistoun*, for defendant.

Mathers, J.]

BROCK v. ROYAL LUMBER CO. [Dec. 30, 1907.]

Contract—Penalty or liquidated damages.

The defendants entered into an agreement to purchase 1,500 tons of coal from the plaintiffs and to accept delivery between Oct. 1, 1906, and April 1, 1907. The defendants were not obliged to order any particular quantity in any one month, but were at liberty to order portions of the whole at such times within the six months as they might deem best. They were to pay for each amount ordered at the time of the order and for

the whole 1,500 tons on or before 1st April, 1907. The agreement contained the following provision: "And for the insuring of the more effectual performance of this agreement, the purchasers further agree to pay to the vendors on April 1, 1907, the sum of one dollar as a penalty by way of liquidated damages for every ton of the said full amount of 1,500 tons not ordered and paid for by them on April 1, 1907." The defendants failed to order and pay for 467 tons of the coal within the period limited by the contract and the plaintiffs sued to recover \$467 by way of liquidated damages for the defendants' breach of the contract. The plaintiffs, however, had sold their whole supply of coal at a greater profit than they would have realized had the defendants ordered the full amount.

Held, that the contract should be construed as providing for a penalty only and that, as the plaintiffs suffered no damages, they could not recover, because:—

1. The intention was to secure the performance of the contract: *Hudson on Building Contracts*, p. 519;

2. When doubtful the Courts will generally construe the sum payable as a penalty: *Joyce*, par. 1298, 1300; *Mayne*, pp. 155, 156.

3. When the parties themselves call it a penalty, the onus lies on those who seek to shew that the money is to be payable as liquidated damages: *Wilson v. Love* (1896) 1 Q.B., at pp. 630, 632.

4. The actual damages for a breach of the contract could in this case be readily and accurately computed: *Joyce*, par. 1301; *Mayne*, p. 158; 19 *Am. & Eng. Enc.* 402 and 407.

T. R. Ferguson and Mackay, for plaintiffs. *Minty and Donovan*, for defendants.

Cameron, J.]

KING v. McEWEN.

[Jan. 27.]

Criminal law—Crim. Code, ss. 777, 951—*Habeas Corpus Act*, 31 Ch. 2, c. 2, s. 2—*Summary trial—Jurisdiction of police magistrate.*

The prisoner was tried before the police magistrate of the City of Portage la Prairie in the charge of carnally knowing a girl under fourteen years of age, not being his wife. He consented to be tried summarily on that charge. The magistrate held that there was not sufficient evidence to justify a conviction.

tion upon the charge laid, but he convicted the prisoner of an indecent assault and sentenced him to fifteen months' imprisonment.

On application for a habeas corpus it was contended that the magistrate should have given the prisoner an opportunity to elect whether he would be summarily tried upon the substituted charge, also that the magistrate's extended jurisdiction conferred by section 777 of the Code only covered offences committed in the City of Portage la Prairie, and the evidence left it in doubt whether the offence had been committed in that city or in the rural municipality of Portage la Prairie. It was admitted on the argument that the offence charged necessarily included that of which the prisoner had been convicted.

Held, 1. There being nothing in the Criminal Code of Canada relating to the procedure for obtaining a writ of habeas corpus, a prisoner's right to it in Manitoba depends on the Statute of Charles II. c. 2, s. 2, and the writ cannot be taken out on behalf of a prisoner under sentence of conviction by a police magistrate exercising the extended jurisdiction to try indictable offences summarily conferred by section 777 of the Code, unless an absolute want of jurisdiction is shewn: *Re Sproule*, 12 S.C.R. 141.

2. A police magistrate of a city or incorporated town, who is also a police magistrate in and for the whole Province, when acting under section 777 of the Code, may try offences committed anywhere in the Province.

3. It having been admitted that the offence charged necessarily included that of which the prisoner was convicted, there was no necessity to offer a new election to the prisoner.

Anderson, for the prisoner. *Patterson*, D.A.-G., for the Crown.

Province of British Columbia.

SUPREME COURT.

Clement, J.]

[Jan. 4.

CRANBROOK POWER CO. v. EAST KOOTENAY POWER CO.

*Waters and water rights—Jurisdiction of Gold Commissioner—
Change of point of diversion, application for.*

The defendant company, who held a record for 25,000 inches

of water out of the St. Mary's River, granted May 8, 1906, applied, under s. 27 of the Water Clauses Consolidation Act, 1897, to the Assistant Commissioner at Cranbrook to change the point of diversion. This was opposed by the plaintiff company, who held a record, granted Oct. 20, 1906, for 5,000 inches of water out of the St. Mary's River at the new point of diversion applied for by the defendant company. The Commissioner decided that he had jurisdiction under s. 27, but upon it appearing that the defendant company had taken certain proceedings under s. 84, etc., to have their undertaking approved by the Lieutenant-Governor in Council, the Commissioner ruled that his jurisdiction was voided by these proceedings. They appealed under s. 36 and afterwards withdrew, and they also withdrew their application to the Lieutenant-Governor in Council and secured an appointment from the Gold Commissioner to proceed again with the application for a change of point of diversion. On motion by the plaintiff company for prohibition,

Held, that the Commissioner had jurisdiction to entertain the application.

S. S. Taylor, K.C., for plaintiff company. *Smith*, for defendant company.

Clement, J.]

[Jan. 8.

HUGGARD v. NORTH AMERICAN LAND AND LUMBER CO.

Practice—Fixing of venue—Application for after order made in regular way—Case necessary to be made out.

In order to invoke the inherent jurisdiction of the Court to grant an order for change of venue, after the venue has been fixed, the applicant must set up a case shewing circumstances justifying the change.

W. A. Macdonald, K.C., for the application. *S. S. Taylor*, K.C., contra.

Clement, J.]

RE W. P. ELLIS & Co.

[Jan. 14.

Bills of sale—Registration, extension of—Intervening rights.

A company, domiciled in Toronto, Ontario, took a bill of sale on goods in Grand Forks, B.C. It was not possible to send the instrument to Toronto and have it returned for filing with the

Registrar with the affidavit of bona fides within the five days required by s. 7, sub-s. 2, of Bills of Sale Act, 1905.

Held, that, in the order granting an extension of time for filing the instrument, there should be a provision protecting intervening rights.

Full Court.]

[Jan. 17.

DE LAVAL SEPARATOR CO. v. WALWORTH.

NORTH-WEST CONSTRUCTION CO. v. YOUNG.

Principal and agent—Right of principal to recover—Contract of agency—Illegality—Contract prohibited by statute, enforceableness of—Statute, construction—Companies Act, 1897, R.S.B.C., 1897, c. 44, s. 123—Registration—Penalty.

The general rule that persons who enter into dealings forbidden by law must not expect any assistance from the law is not applicable so as to exonerate an agent from accounting to his principal by reason of past unlawful acts, or intentions of the principal collateral to the agency. If the money is paid to him in respect of an illegal transaction, he is bound to pay it over, provided that the contract of agency is not itself illegal.

The making of the contract in this case was not a "carrying on business" within the meaning of the Companies Act. Decision of HUNTER, C.J., upheld on different grounds.

An unlicensed extra-provincial company, carrying on business within the province, sued for a balance due upon a contract to deliver building stone, entered into within the province. The defence advanced was that, by reason of s. 123 of the Companies Act, the contract was illegal and void.

Held, on appeal, reversing the decision of CANE, Co. J., that as the act to be done in pursuance of the contract was prohibited by statute, the contract was therefore unenforceable.

Martin, K.C., and *Craig*, for appellants. *Davis*, K.C., and *Barker*, for respondents.

Full Court.]

WALSH v. HERMAN.

[Jan. 17.

Foreign Court, jurisdiction of—Judgment obtained in an undefended action for statute barred claim.

Judgment was given against defendant in Ontario in January, 1906, on a claim arising out of a promissory note signed

in 1898. The action was undefended, although defendant was duly served in British Columbia. He left Ontario in 1899, for Winnipeg, and afterwards came to British Columbia, where he has since resided. Plaintiff sued in British Columbia on this judgment. At the trial, evidence was given of a payment made after the British Columbia action had been commenced, and it was sought to make this payment operate as a revival of the statute barred debt.

Held, by the Full Court, following *Sirdar Gurdyal Singh v. Rajah of Faridkote* (1894) A.C., 670, that defendant had acquired a British Columbia domicile, and was not subject to the Ontario Courts.

Held, also, following *Bateman v. Pinder* (1842), 11 L.J. Q.B., 281, that the payment made could not operate to defeat a plea of the Statute of Limitations, and that it was a mere conditional offer of compromise which was declined.

A. D. Taylor, for appellant. *Macdonell*, for respondent.

Full Court.]

[Jan. 22.

CORTESE v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Railways—Railway Act, R.S.C. c. 37, s. 254, sub-s. 4—“Locality,” meaning of—Obligation to fence.

Plaintiff's animals were killed on the defendants' track, the right of way of which passed in front of his land. There was no fence erected on this portion of land, either by the railway company or plaintiff. The north end of the plaintiff's ranch was within 800 yards of the municipal limits of Fernie. There were about two acres of the ranch with a frontage of 450 feet on the right of way, and about 200 feet off was an enclosure used as a goat pen, about 20 x 30 feet. There was also a potato patch of about three-quarters of an acre, and a moveable fence separating this patch from a grassy portion. This, together with a piece of fencing along a waggon road, but not reaching the right of way by some 225 feet, was the only fencing on the ranch. There was evidence of scattered places in the vicinity some being fenced and others not, but with unfenced and unoccupied land intervening.

Held, reversing the decision of *WILSON, Co. J.*, (*CLEMENT, J.*, dissenting), that as the land in question per se could not be classed as a settled or inclosed locality, there was no obligation

on the company to fence its right of way in the absence of an order of the Board of Railway Commissioners to do so, and that their contiguity to the limits of an incorporated town did not constitute the lands a portion of the settled locality of such town.

Having regard to the powers given the Board of Railway Commissioners by section 254 of the Railway Act, and particularly the language of sub-section 4, the word "locality" must be construed without reference to the proximity of town limits.

Davis, K.C., for appellant. Burns, for respondent.

Hunter, C.J.]

[Jan. 29.

ANGLO-AMERICAN LUMBER CO. v. McLELLAN.

Company law—Sale of shares—Resolution of company empowering president to sell—Note given for purchase price—Note and shares placed in bank in escrow pending payment of note—Allotment.

Defendant purchased fifty shares in plaintiff company, giving his note for \$5,000 therefor, payable ten days after date, signing at the same time an application for the shares. There was some evidence of an arrangement between defendant and the president of the company that defendant was to be employed as a foreman by the company, and that if he proved unable to perform the work, the president would take back the shares and refund the money. Apparently there was no formal allotment of the shares by the company beyond a resolution empowering the president to dispose of the shares, but the president placed the shares and the note in escrow in the bank, the shares to be delivered up on payment of the note.

Held, that upon the signing of the application and the delivery of the note, the defendant became the owner of the fifty shares, with power to forthwith validly assign them to anyone else, or to have bound himself to do so on the issue of the certificates if the company's articles of association required endorsement of the certificates; and that there was no nature of allotment necessary.

J. A. Russell, for plaintiff company. Craig, for defendants.

Law Associations.

COUNTY OF HASTINGS LAW ASSOCIATION.

At the annual meeting the following officers were elected for 1908:—

Hon. President, John Parker Thomas, K.C.; President, William N. Ponton, K.C.; Vice-President, E. J. Butler; Treasurer, W. S. Morden; Secretary, A. A. Roberts; Curator, W. C. Mikel, K.C.; Librarian, Miss McRae; Auditors, Messrs. P. J. M. Anderson and A. A. Roberts; Trustees, F. E. O'Flynn, Stewart Masson, J. F. Wills, E. Guss Porter, K.C., W. B. Northrup, K.C.

HAMILTON LAW ASSOCIATION.

The annual meeting of the Hamilton Law Association was held Jan. 14th, 1908. The Twenty-eighth Annual Report (for 1907) shews a membership of 71, a library of 4,470 volumes, of which 107 were added during the year. The library is kept insured for \$8,800.

A report was brought in by the Committee on a Tariff for Conveyancing, etc. It was decided to adopt the tariff as amended and that it be printed and distributed.

The following officers were elected for 1908:—President, Mr. S. F. Lazier, K.C.; Vice-President, Mr. Wm. Bell; Treasurer, Mr. Chas. Lemon; Secretary, Mr. W. T. Evans. The Trustees were elected as follows: Geo. Lynch-Staunton, K.C., S. F. Washington, K.C., P. D. Crerar, K.C., T. C. Haslett, E. D. Cahill. Auditors, Messrs. W. S. McBrayne and James Dickson. Committee on Legislation, Messrs. S. F. Lazier, K.C., Wm. Bell, A. Bruce, K.C., Geo. Lynch-Staunton, K.C., S. F. Washington, K.C., W. T. Evans and E. D. Cahill.

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HON. MR. JUSTICE KILLAM.

As we go to press the news comes of the death of the Chairman of the Board of Railway Commissioners. He passed away suddenly at Ottawa yesterday, March 1, from an attack of pneumonia.

The death of this eminent judge is a calamity, and especially so at the present time when the need of such a man is so great, and the necessity for increased strength in the Commission has been recognized, and steps taken to increase it. There is no one on the Board who can fill his place; nor does there seem to be at present any man who would care to leave his practice at the Bar who could as well perform the difficult and onerous duties which fall upon the Chairman of such an important Court as the one over which Mr. Killam lately presided.

As to the loss which the country has sustained we may well quote the words of the Minister of Railways on hearing of Mr. Killam's death: "He was a man of many-sided genius and his great ability seemed to have found the proper sphere for its full exercise. As Chief of the Board of Railway Commissioners he was solving the problem of railway transportation difficulties in a manner at once acceptable to all concerned and in the interest of the whole country. I am simply appalled at the loss I have sustained as head of the Railway Department." To the duties of his position he brought an impartial and receptive mind stored with legal lore and a unique capacity for applying the law to the facts before him; to this was added a calm, courteous and dignified judicial demeanour which greatly facilitated business. It is said of him that he did not talk much while on the Bench, but, listening most attentively, nothing escaped him. In this respect he shewed an example which might well be followed by others.

Both as a man and as a judge it has been well said that "he was a credit to Canadian citizenship and an ornament to the Canadian Bar and Bench."

The deceased was a native of Yarmouth, N.S., where he was born in 1849. Coming to Toronto he took high honours at the University, and in that city commenced the study of law. He was called to the Bar of Ontario in 1877, and after practising there for a short time removed to Winnipeg, where he was raised to the Bench in 1885. Four years afterwards he became Chief Justice of the Court of King's Bench of the Province of Manitoba, and in 1903 was transferred to the Bench of the Supreme Court of Canada. From this comparatively easy and quiet position he was, early in 1905, called to a much more strenuous service in the Chairmanship of the Board of Railway Commissioners, a Court which has to discuss and cope with matters of the highest moment in great affairs connected with the commerce of a growing country, as well as to deal with a multitude of details, which to a less able mind would be simple overwhelming. He passes away at a time when he is most needed, and when the country has begun to recognize his commanding abilities and immense usefulness.

The Dominion Government is now confronted by a most responsible duty—none greater in the line of judicial appointments has ever fallen to their lot—in the selection of a judge to fill Mr. Killam's place. The people look to them to do their duty in this respect apart from party politics, or personal favours, or any such paltry considerations. The time has surely gone by for such modes of dealing with the great problems that confront the representatives of the people of this Dominion. We shall not now express any opinion as to the record of this Government in this respect in the past, even in the thought of their own political friends, but the whole country now looks to them to fulfill the sacred duty entrusted to them in this regard by the appointment of the best man to preside over this most important Court, and who shall be a worthy successor of the one who has unhappily been removed therefrom.

PROFESSIONAL ETHICS.

Vol. 32 of the reports of the American Bar Association has come to hand, and it we find an old and valued friend. Many years ago we read and pondered with pleasure and profit Judge Sharswood's *Essay on Professional Ethics*, which has now reached its fifth edition. It is incomparably the best thing that has been published on that most important subject; and there is no better reading for a law student or lawyer or for any professional man than this masterly essay.

The whole book is full of meat of the most nutritious kind for the development of the highest ideal of a lawyer. The nobility and purity of thought and the intelligent grasp and luminous expression of his views as to matters connected with all branches of professional ethics and business department come out on every page.

Whilst strongly recommending those of our readers who have not read this book to do so without delay, we cannot forbear from making some extracts at the present time.

Speaking of legislation and law reform, whilst he deprecates "rash innovation and unceasing experiment" he claims that "it is a province of legislation by slow and cautious steps to amend the laws;" but that there must be no "blind attachment to principles of jurisprudence or rules of law because they are ancient. True conservatism is gradualism—the movement onward by slow, cautious and firm steps—but still movement, and that onward. The world neither physically, intellectually, nor morally, was made to stand still. As in her daily revolutions on her own axis, as well as her annual orbit round the sun, she never returns precisely to the same point in space which she has ever before occupied. It would seem to be the lesson which the Great Author of all Being would most deeply impress upon mind as he has written it upon matter: 'By ceaseless motion all that is subsists.' "

It is difficult to make choice of an extract to shew the author's

view of what should be a lawyer's character. There are so many that might well be reproduced, but let us quote the following:—
“That lawyer's case is truly pitiable upon the escutcheon of whose honesty or truth rests the slightest tarnish. Let it be remembered and treasured in the heart of every student that no man can ever be a truly great lawyer who is not in every sense of the word a good man. The strictest principles of integrity and honour are the only safety of the young professional man. There is no profession in which moral character is so soon fixed as in that of the law. There is none in which it is so subjected to the severe scrutiny of the public.”

In another place he gives the following excellent advice:—
“The anxiety of the young lawyer is a natural one at once to get business—as much business as he can. Throwing aside his books he resorts to the many means at hand of gaining notoriety and attracting public attention, with a view to bringing clients to his office. Such a one in time never fails to learn much by his mistakes, but at a sad expense of character, feeling and conscience. He at last finds that in law, as in every branch of knowledge, a little learning is a dangerous thing. No better advice can be given to a young practitioner than to confine himself generally to his office and books, even if this should require self-denial and privation, to map out for himself a course of regular studies, more or less extended according to circumstances.”

We might take a lesson from the scholars of China, who go through a training immensely more difficult and laborious than those of any other country. They commit to memory vast quantities of literature, as a matter of mind training and as a treasure store-house for future use. If the contents of Mr. Sharswood's book could be treated in this way it would be better for all concerned.

AMENDMENT TO THE LAW REGARDING BRIBERY.

Attention was drawn in these columns (Vol. 42, p. 697) to the desirability of supplementing the laws against bribery by an enactment prohibiting attempts to influence voters by promises or threats regarding the expenditure of public money in any electoral district. We are glad to see that our proposal has at last borne fruit, and that a bill aimed at this extremely mischievous form of corruption has been introduced into the House of Commons. That this measure follows very closely the lines suggested in the article mentioned above is apparent from the following provision:—

“Every person who directly or indirectly, by himself or by any person on his behalf, before or during an election, in order to induce, or in such manner as might induce, any voter or class of voters, or the voters in a particular electoral district, to vote for or against any candidate, or to refrain from voting, by public speaking, by any writing, by any printed publication, or otherwise, offers or promises, or offers or promises to procure or to endeavour to procure, or suggests the probability of the expenditure of the public moneys of Canada, within an electoral district or districts, if and in case, only, such voter or voters procure or assist to procure the return of a particular candidate, or of a candidate, of a particular party, or, who, with the intent or manner aforesaid, threatens or promises to impede, delay, hinder, prevent or diminish such expenditure, is guilty of the indictable offence of bribery, and liable to imprisonment for a term not exceeding one year, and not less than six months, and shall also forfeit the sum of one thousand dollars to any person who sues therefor, with costs.”

No one, we imagine, will contend that during the year which has elapsed since the publication of our own remarks on the subject the need of a statute of this description has decreased. It is sincerely to be hoped that the proposer, Mr. Alcorn, will succeed in inducing the House to ratify his praiseworthy endeavour to purify politics in this direction.

Those considerations of temporary advantage which will be recognized, though perhaps not openly urged, as reasons for

declining to surrender so effective an instrument for attracting and retaining voters may possibly prove to be an adverse influence too powerful to overcome. It remains to be seen whether the obvious propriety of this amendment of the law, and the reflection that its adoption would unquestionably subserve the ultimate interests of the predominant party, will supply motives sufficiently cogent to induce the majority to sanction Mr. Alcorn's bill.

LAW REFORM.

We are glad to note that the Attorney-General of Ontario has agreed to the suggestion that the subject of law reform should stand over until next session so that it may receive full consideration before any change is crystallized by statute.

It is well to quote for the benefit of those concerned any suggestion which would seem to be helpful in the consideration of this important subject. To this end we make the following extract from the *Ottawa Citizen*. The writer evidently takes very much the same view as we have expressed in reference to the re-construction of the Court of Appeal. His words are as follows:—

“The Court of Appeal for Ontario is and has been for many years one of the most satisfactory in the Dominion, and it would not be in the public interest to substitute for it a Court without any continuity or cohesion, where personelle would vary from day to day, and from which uniformity of decision could not be expected. An alternative plan has been suggested by high authority, which it appears to the *Citizen* would be found to work much more satisfactorily. It is, in brief, as follows: Appeals from a High Court judge to the present Divisional Courts would be abolished, and the present Court of Appeal retained, but as it would be obviously impossible for the latter, as at present constituted, to deal with all of the work thus thrown upon it, three High Court judges would be assigned to it, to serve for a year, and then to be replaced by another three for a similar term. The Court would sit in two divisions, one

made up of the five regular appeal judges, and the other of the three acting appeal judges. The list of appeals inscribed for hearing would be gone over from time to time by the chief justice of Ontario, who would assign the cases to be heard by the division of five regular judges or by the division of three acting judges according to his view of their relative importance. The division of three might sit monthly, as do the present Divisional Courts, and the division of five either quarterly or monthly, as occasion might require. The present Divisional Courts would be retained for the limited purpose of hearing appeals from inferior tribunals, as proposed by Mr. Foy. This plan, while providing only one Appellate Court for the Province, would be free from the objections which we have pointed out as applicable to the plan proposed in the government's resolution. It is a question, however, whether the evils of the present system of appeals within the Province are not more apparent than real."

The most amusing reading for lawyers is not the legal Joe Millerisms, but the funny things said by newspaper writers, often in our best daily journals. We have given some of these, much to the amusement of our readers. The following is from the *Montreal Star*. The writer, not knowing how funny he is, but apparently in sober earnest, thus prints his meditations on the subject of law reform now so much under discussion:—

"The sort of law reform which the people want is to get the law so written that even a layman, though he be no wiser than a lawyer, shall not err therein. It ought to be possible for a man to have the law on some particular point read over^a to him; and for him then to know what the law means and what he must do. He ought not to have to go to a judge to find out—and often to find out to his heavy cost. The law should be simple enough for him to understand and clear enough to be interpreted without reference to the decisions of other judges. There is enough complexity about Parliament-made law without adding to the complexity of judgment-made law."

There is a charming simplicity about this which must appeal to all. He thinks this "would save more money than the cutting

off of all appeals—a species of law reform, by the way, which may not always make for justice.” We regret that in this he is not able to concur with some of his learned brethren in the Province of Ontario who think that appeals should be almost, if not entirely, done away with. The writer is a curious combination of an optimist and a pessimist, and longs for the time when “the law can be codified in lay language, and then if procedure could be simplified so that an intelligent layman could take his own case before a lower Court, the cost of justice in this country would be tremendously reduced.” He is apparently like Diogenes of old seeking with his lantern for the public man who would take up law reform in this spirit, and so become the most popular man in the country “outside of the law offices, yes, and inside the best of these, for the good lawyer does not make the most of his money out of litigation.” The last remark indicates that the writer has some lucid intervals. But possibly we misjudge him, for, after all, he may be a man of infinite jest who thus seeks to instruct his less sensible brethren of the press.

SOME RECENT CRITICISMS ON REAL PROPERTY STATUTES.

There are some observations in Mr. Armour’s interesting address before the Ontario Bar Association to which, if correctly reported, we think a demurrer might be entered. We say this, however, with some diffidence, as it is a bold thing to question a legal proposition laid down as such by Mr. Armour.

In taking exception to the wording of the Wills Act, R.S.O. c. 128, s. 10, he is reported as having referred to it as follows: “A man can make a will of anything that would devolve upon his executor. There could not be anything more absurd. It is a mere mistake, of course.”

The section referred to reads as follows: “Every person may devise, bequeath or dispose of by will executed in manner hereinafter mentioned, all real estate and personal estate to which

he may be entitled at the time of his death, and which, if not devised, bequeathed or disposed of, would devolve upon his heirs-at-law or upon his executor or administrator."

With great respect to so learned an authority we do not think that there is any mistake or absurdity whatever in the section. A person may make a will and appoint an executor whereby his property real and personal will devolve on his executor, although the testator may not have devised or bequeathed or disposed of any part of it to anybody.

The statute does not say, as was assumed, "and which if he made no will," but "which if not devised, bequeathed or disposed of." The statute simply provides that all such property which would so devolve in case no disposition were made, he may, by will, devise, bequeath and dispose of. The assumption that "to make a will" and "devise and bequeath and disposes of" are convertible terms, is, in our opinion, ill founded.

Mr. Armour is reported also to have said: "In the reign of Edward I. land was first made alienable." What does this mean? The statute *Quia Emptores* to which he refers seems to assume that sales were then quite common, and all that it attacked was the process of sub-infeudation which was then going on to the detriment of the chief lords. According to the translation of the statute in R.S.O. c. 330, s. 2, the statute opens with the words "Forasmuch as purchasers of land and tenements of the fees of great men and other lords, have many times heretofore entered into their fees, etc." Of course there could not be "purchasers" unless there were also "sellers." No doubt there were restrictions on alienations, and the consent of the superior lord was necessary, and fines on alienation were payable to them; but surely it is a mistake to say that in the reign of Edward I. land was first made alienable in England. We think there must have been some mistake in the report on this point.

We are also disposed to think Mr. Armour was a little hypercritical in regard to s. 12 of the Devolution of Estates Act in regard to the provision made for a wife of an intestate, who, after payment of debts, funeral and testamentary expenses, is to

get \$1,000. "Testamentary expenses" in this connection seem to be the solecism against which Mr. Armour's soul rebels; how can there be testamentary expenses when there is no will? Many words gradually acquire a meaning which their etymology does not warrant, e.g., it has been over and over again decided that succession duty is a "testamentary expense," although it has nothing to do with a will, and is payable equally whether there is a will or not. The use of the word "testamentary" in this section may, we think, be defended on the ground that when a deceased person makes no will the law by its provisions in regard to the devolution of his estate makes a will for him, and therefore, though the deceased may have made no will, his estate is nevertheless chargeable with testamentary expenses: see *Re Clemow* (1901) 2 Chy. 182, where it was decided that a direction to pay the "testamentary expenses" of the testator's widow included the cost of taking out administration to her estate, she having died intestate.

Mr. Armour's criticisms on the Landlord and Tenants Act, R.S.O. c. 170, ss. 14, 15, are interesting and possibly well founded. He suggests a somewhat curious condition of things in that the two sections are said to have been drawn, and submitted to the English Parliament, as alternative proposals; but that the Parliament by mistake enacted both. A perusal of the two sections does not seem to us to necessarily lead to the conclusion that they were ever intended as merely alternative modes of dealing with the same thing. Sec. 14 seems to deal with the case of total assignments of the demised premises, whereas s. 15 purports to deal with assignments of part of the demised premises, or of partial interest therein.

Mr. Hoyles, who was also a speaker on the same occasion, suggested that all lands should be legislatively converted into chattels real. This is, however, no new suggestion in this province. It was made over thirty years ago to that eminently conservative lawyer the late Sir Oliver Mowat; but he was afraid to accede to it. The abolition of dower was also a matter proposed to him, but he told the writer that on account of a

similar proposal the late John Hillyard Cameron lost his election in Peel, where the cry was made that he was trying to rob the farmers' wives of their dower. This is the way law reform sometimes suffers at the hand of politicians.

G. S. HOLMESTED.

MASTER AND SERVANT—A HIRING BY THE MONTH.

A point of law not often clearly defined is the question as to what constitutes a hiring by the month. The recent case of *The Pokanoket*, 156 Fed. Rep. 241, attempts to negatively limit the question by stating what does not constitute a hiring by the month, holding that a verbal contract between the owner of a vessel and a marine engineer for the service of the latter, in which his wages were fixed at a stated sum per month, but without any specified term of employment, constituted a hiring at will, and not by the month, and, in the absence of any established usage to the contrary, either party had the right to terminate the employment at any time without notice, and, upon the employee's discharge, he was entitled to wages only to the time of such discharge.

The testimony of the libelant in regard to the verbal contract of employment was as follows: "It was a verbal contract between Mr. Davis and me at Petersburg on the steamer *Aurora*, the steamer I was running on at the time, and he asked me if I would go to St. John and help him look at the boat, and if I would come down with her, and that my wages—he asked me what I would want a month and I gave him my price, \$80 per month, to go chief, and I said I will go down and come with the boat, and he said the wages would be the same as when working on the *Aurora*, but the day she gets to Norfolk my pay would be \$80 per month and start at that time. I was getting \$70 per month on the *Aurora*." The Court, in holding this verbal agreement to constitute a hiring at will, said: "The chief point presented is the construction of the contract under which

the libelant was employed. He insists that it was by the month, and that it was a violation of its terms to discharge him except upon a month's notice. The District Court took this view and entered a decree for the libelant for \$80, the full month's wages for July, 1906, and for costs. In this we think there was an error. The contract, which is fully set out in the testimony of the libelant as given above, has, in our opinion, the effect to determine the measure of compensation, but does not fix a definite period of employment. In other words, the contract constitutes nothing more, in law, than what is known as a hiring at will, which could be ended at any time, by either party, without notice. There was no evidence of any settled usage or custom of the port which would take the contract in this case out of the rule which governs such contracts generally. There is nothing in the contract of employment which can be construed to mean that the libelant was required to serve the employer for any specified time; nor is there anything to indicate that the employer was bound to retain him in service for a definite period. The continuance of the term of service was left discretionary with both parties, and either had a right to put an end to it at any time."

In case of *The Pacific*, 18 Fed. Rep. 703, an engineer was employed on a steam tug about a harbour at a certain rate per month, but without any agreement as to the duration of his service. Held, in the absence of proof of any settled usage, that he could be discharged at any time without previous notice, and could recover only for the time actually served. The learned judge (Morris), in delivering the opinion in this case, said: "Unless the verbal contract proved is controlled by usage or custom, or some presumption of law or fact, it must be held to be a general or indefinite hiring, and, I take it, the law as to such a contract is correctly stated in Wood, Master & Servant, 272."

The quotation from Mr. Wood's treatise in the preceding citation is as follows: "With us the rule (different from the English rule) is inflexible that a general or indefinite hiring is *prima facie* a hiring at will, and, if the servant seeks to make it out a

yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, or year, no time being specified, is an indefinite hiring and no presumption attaches that it was for a day even, but only at the fixed rate for whatever time the party may serve. It is competent for either party to shew what the mutual understanding of the parties was in reference to the matter, but, unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party. . . . Thus it will be seen that the fact that compensation is measured at so much a day, month, or year does not necessarily make such hiring a hiring for a day, month, or year, but in all such cases the contract may be put an end to by either party at any time, unless the time is fixed and a recovery had at the rate fixed for the service actually rendered."—*Central Law Journal*.

By the death of the late Judge of the Exchequer Court of Canada the country loses an able and a conscientious judge, and Ottawa a good citizen. Grown up with the Court over which he presided, he had a thorough knowledge of its scope, procedure and requirements, while, by his judgments, he had obtained the general confidence both of the Bar and of the Government. That his decisions were but infrequently reversed on appeal indicates the correctness of his law and the maturity of his judgment. In the prime of his life and in the midst of his usefulness he was compelled to cease temporarily—as it was hoped—from his labour; then, when informed of the incurable nature of his disease, and knowing that his days were numbered, he methodically completed his judgments, arranged his affairs, and calmly awaited the inevitable summons. The late judge was born at Cornwallis, Nova Scotia, on Feb. 6, 1847. He was called to the Bar of that province in 1872, made Deputy Minister of Justice in 1882, and, five years later, was appointed Judge of the Exchequer Court of Canada.

REVIEW OF CURRENT ENGLISH CASES.

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DEED—MISREPRESENTATION AS TO CONTENTS—PLEA OF NON EST FACTUM.

Howatson v. Webb (1908) 1 Ch. 1. It is not surprising to find that the judgment of Warrington, J., (1907) 1 Ch. 537 (noted ante, vol. 43, p. 441) has been affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Farwell, L.J.J.). The case turns upon a defence of non est factum set up in the following circumstances. The defendant was formerly a managing clerk to one Hooper, a solicitor, and acted as Hooper's nominee in a building speculation, and certain lands were conveyed to him as such nominee. Shortly after leaving Hooper's employment Hooper requested him to execute certain deeds, and on his asking what they were, he was told they were deeds transferring the lands above referred to, and without further inquiry he executed the deeds. One of the deeds turned out to be a mortgage in favour of the plaintiff and contained a covenant by the defendant for payment of the mortgage debt, to enforce which the present action was brought. The defendant set up that the mortgage was not his deed by reason of the misrepresentation of Hooper; but the Court of Appeal agreed with Warrington, J., that the misrepresentation being only as to the contents of a deed known by the defendant to deal with the property, the defence failed. Farwell, L.J., suggests that the old cases on the effect of misrepresentation as to the contents of a deed were based on the illiterate character of the persons to whom the deed was presented for execution, and that an illiterate person was treated as a blind man, and doubts whether in the present day an educated person, who is not blind, is not estopped from setting up non est factum against a person who innocently acts upon the faith of the deed being valid. With which suggestion the Master of the Rolls concurred. The appellants contended that though the conveyance of the land might be valid, yet that the covenant to pay was not a necessary part of the mortgage and the defence of non est factum was separable and was valid as to that, but this contention failed.

WILL — CONSTRUCTION — BEQUEST TO CHILDREN “BORN” PREVIOUSLY TO DATE OF WILL—CHILD EN VENTRE SA MÈRE.

In re Salaman, De Pass v. Sonnenthal (1908) 1 Ch. 4. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have reversed the decision of Kekewich, J., (1907) 2 Ch. 46 (noted ante, vol. 43, p. 691). The Court holding that there is a general rule of construction that in the absence of a contrary intention a gift by a will to children “living” or “born” at a given period, includes a child en ventre sa mère at that date, and born alive afterwards. In this case the gift was of £500, to the testator’s great nephews and great nieces “born previously to the date of this my will”—at the date of the will there was a great niece en ventre sa mère subsequently born alive, and she was held entitled to participate in the gift.

LANDLORD AND TENANT—COVENANT NOT TO ASSIGN WITHOUT CONSENT—COVENANT BY LESSEE TO LIVE ON DEMISED PREMISES AND CONDUCT BUSINESS—ASSIGNMENT TO LIMITED COMPANY—OBJECTION NOT TAKEN IN COURT BELOW—COSTS.

In Jenkins v. Price (1908) 1 Ch. 10 the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have reversed the decision of Eady, J., (1907) 2 Ch. 229 (noted ante, vol. 43, p. 649) on a ground not taken in the Court below. The plaintiff was a lessee of a public house, the lease contained a covenant not to assign without leave of the lessor, such leave not to be unreasonably withheld. It also contained a covenant by the lessee to live on the premises and personally conduct the business of a licensed victualler. The plaintiff proposed to assign the premises to a limited company and the plaintiff declined to consent except upon the terms of the proposed assignees agreeing to pay an increased rent and to extend the term from twelve to twenty-one years. The plaintiff claimed that these terms were unreasonable and he prayed a declaration that he was entitled to assign without leave which Eady, J., granted. On the appeal the defendant took the ground that a limited company could not perform the covenant as to personal residence, and on this ground the appeal was allowed, because, as the Court of Appeal held, that covenant amounted to a covenant not to assign to a limited company, but although allowing the appeal and dismissing the action no costs were given to the defendant because the ground on which he had succeeded had not been taken in the Court below.

HIGHWAY—DEDICATION—LESSEE.

Corsellis v. London County Council (1908) 1 Ch. 13. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have affirmed that part of the decision of Neville, J., (1907) 1 Ch. 704 (noted ante, vol. 43, p. 523) to the effect that a sub-lessee of premises cannot make an effectual dedication of part of the demised premises as a highway, so as to bind his lessor. One point is brought out on appeal which was not mentioned in the former note of the case, viz., that after the alleged dedication by the sub-lessee, his lessor assigned to him the head-lease under which the lessor held, with a proviso against merger of the under-lease. This head-lease was subsequently reassigned by the under-lessee to his lessor for value without notice of the alleged dedication, and the Court of Appeal held the lessor was a purchaser for value without notice of any claim for dedication.

ESTATE TAIL—PROTECTORS OF SETTLEMENT—SURVIVORSHIP—
PROVISION FOR FILLING VACANCY IN CASE OF DEATH OF ONE
OF SEVERAL PROTECTORS—FINES AND RECOVERIES ACT 1833
(2-3 WM. IV. c. 74) ss. 22, 23—(R.S.O. c. 122, s. 20.)

In re Bailey—Worthington & Cohen (1908) 1 Ch. 26. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) affirming Neville, J., hold that where by a settlement three persons are appointed protectors of the settlement, accompanied by a provision for appointing persons to fill the vacancy in case any of them die, that unless and until such power is exercised, in the case of death of any one or more of the protectors, the protectorship survives in the survivors or survivor, whose consent alone would be sufficient to give effect to a disentailing deed.

STATUTE OF LIMITATIONS—MORTGAGE OF PROCEEDS OF LAND—
PAYMENT INTO COURT BY TRUSTEE OF MORTGAGED ESTATE—
PAYMENT OUT—RES JUDICATA—MORTGAGEE—REAL PROP-
ERTY LIMITATION ACT 1833 (3-4 WM. IV. c. 27) s. 34—REAL
PROPERTY LIMITATION ACT 1874 (37-38 VICT. c. 57) s. 8—
(R.S.O. 133, s. 22; IB. c. 72, s. 1(1) b. h.).

In re Hazeldine (1908) 1 Ch. 34. Here the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.)

have been unable to agree with the decision of Warrington, J., (1907) 1 Ch. 686 (noted ante, vol. 43, p. 522. The facts were that persons entitled to the proceeds of land vested in trustees mortgaged their interest to the Union Deposit Bank and subsequently to other persons. The land was sold by the trustees and the proceeds were paid by them into Court in 1896. No payment had since been made or acknowledgment given by the mortgagors to the bank, and the mortgagors now applied for payment out of Court, contending that the claim of the bank both on the land and under the covenant in their mortgage was barred by the Statute of Limitations. Warrington, J., although admitting this, held that the statutes had not the effect of barring the claim of the mortgagees as to the moneys in Court, but there was one point which he neglected to take into consideration, viz., that the mortgagees had previously applied for payment out of Court of the amount of their claim which application had been dismissed, and no appeal was brought from that dismissal, the Court of Appeal therefore held the case was *res judicata* and the claim of the bank failed on that ground. The Court of Appeal, moreover, do not seem to think there was any legal foundation for the ground on which Warrington, J., proceeded.

FERRY—BRIDGE—TRAFFIC DIVERTED—DISTURBANCE OF FERRY.

Dibden v. Skirrow (1908) 1 Ch. 41 is authority for the proposition that the erection of a bridge over a river over which a person has the franchise of a ferry, is not a disturbance of the ferry; the franchise of a ferry not conferring an exclusive right to carry by any means whatever, but only the exclusive right to carry by means of a ferry. So Neville, J., held and the Court of Appeal (Cozens-Hardy, M.R. and Moulton and Farwell, L.JJ.) affirmed his decision.

DISTRESS—GOODS OF UNDER-LESSEE—DISTRESS FOR RENT DUE FROM HEAD-LESSEE—EXEMPTIONS FROM DISTRESS—PROPRIETARY CLUB—PICTURES ON DEMISED PREMISES FOR EXHIBITION OR SALE—PRIVILEGE FROM DISTRESS.

In *Challoner v. Robinson* (1908) 1 Ch. 49 the plaintiff was proprietor of the United Arts Club and was tenant from year of the club premises as under-lessee. He undertook all the liabilities of the club and received all the profits. One of the

objects of the club was to hold exhibitions of pictures sent in by members, mostly for sale on commission, the plaintiff receiving ten per cent. commission on all sales as his profit. The club was managed by a committee of which the plaintiff was a member, and the exhibitions were managed by a picture committee. The exhibitions were not open to the public but only to members or persons introduced by members. The defendants as superior landlords put in a distress for rent under which certain pictures so sent for exhibition and sale were seized. The action was brought to restrain proceedings on the distress. Neville, J., held the pictures were liable to distress and the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) affirmed his decision, on the ground that the pictures were not sent to the plaintiff, but to the picture committee and even if delivered to plaintiff they were not delivered to him "to be managed in the way of his trade" which was that of a club proprietor and not that of a picture dealer, and the case was not, therefore, within *Simpson v. Hartopp* (1744), Willes 512, 1 Sm. L.C. 437 (11th ed.).

COMPANY—DIRECTOR—QUALIFICATION SHARES OF DIRECTOR HELD IN TRUST—RIGHT OF CESTUI QUE TRUST OF SHARES TO CLAIM REMUNERATION RECEIVED BY THEIR TRUSTEE AS DIRECTOR.

In re Dover Coalfield Extension (1908) 1 Ch. 65. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have affirmed the judgment of Warrington, J., (1907) 2 Ch. 76 (noted ante, vol. 43, p. 617), to the effect that the cestuis que trust of shares in a limited company has no right to call on his trustee to account for remuneration received by him as a director of the company, although the shares held by him in trust constitute his qualification as a director.

WILL—EXPRESS TRUST OF RESIDUE—PARTIAL FAILURE OF BENEFICIAL INTEREST—NEXT OF KIN—ADVANCES BY TESTATOR TO CHILDREN—HOTCHPOT—STATUTE OF DISTRIBUTION (22-23 CHAS. II. c. 10) s. 5—(R.S.O. c. 335, s. 2) EXECUTORS' ACT 1830 (11 GEO. IV. & 1 WM. IV. c. 40) s. 1.

In re Roby, Howlett v. Newington (1908) 1 Ch. 71. In this case a testator had bequeathed his residue to his executors in trust as to £1,500 to invest and pay the income to his daughter for life, and after her death to divide the capital amongst her

issue, there was no gift over of the £1,500. The daughter died without issue, there was, consequently, an intestacy as to the £1,500, which passed to the next of kin who were four daughters and some grandchildren of the testator. Advances had been made to some of these daughters by the testator, and if they were brought into hotchpot the whole of the £1,500 would go to the grandchildren. *Neville, J.*, (1907) 2 Ch. 84 (noted ante, vol. 43, p. 691) held, that there being only a partial intestacy, the provisions of the Statute of Distribution as to hotchpot did not apply. Also that the Executors' Act, 1830, did not apply because the £1,500 was held by the executors not as executors but as trustees. This decision the Court of Appeal (*Cozens-Hardy, M.R.*, and *Moulton and Farwell, L.JJ.*) have now affirmed.

COMPANY—SHAREHOLDERS—GENERAL MEETING—NOTICE OF BUSINESS TO BE TRANSACTED AT MEETING—SUFFICIENCY OF NOTICE—ULTRA VIRES—ACTION BY SHAREHOLDERS.

Normandy v. Ind., Coope & Co. (1908) 1 Ch. 84. This was an action by the plaintiffs as shareholders of a limited company on behalf of themselves and all other shareholders claiming a declaration that certain extraordinary general meetings of the shareholders had not been duly convened and that certain resolutions adopted thereat were not duly passed; and an injunction to restrain the company and directors from carrying such resolutions into effect; and a declaration that an agreement to give a retiring director a pension was not binding on the company, and a declaration that the directors were liable to refund to the company extra remuneration beyond what was authorized by the articles of association which had been paid them under the alleged invalid resolutions. *Kekewich, J.*, held that a notice to shareholders informing them that the particulars of the business to be transacted could be seen by inspection of a paper in the company's office, was not a sufficient compliance with the articles of association which required "the general nature" of the business to be transacted to be stated in the notice convening meetings, and therefore that the resolutions were not duly passed. He also held that as the articles of association fixed the remuneration of shareholders which could only be increased by general meeting of the shareholders, an agreement to give a retiring director a pension was ultra vires of the directors, unless and until confirmed by a general meeting: but he was of the opinion that although what was complained of was

unwarranted, yet that it might, nevertheless, be all ratified and confirmed by the company at a meeting duly called, and therefore that the plaintiffs had no locus standi, and that their only remedy was to appeal to a meeting of the company. Though dismissing the action, however, he gave no costs.

WILL—"PERSONS WHO ARE THE TRUSTEES OF THE WILL OF A."—
EXECUTORS OF LAST SURVIVING TRUSTEE—CONVEYANCING AND
PROPERTY ACT 1881 (44-45 VICT. c. 41) s. 30—(R.S.O.
c. 127, s. 3).

In re Waidanis, Rivers v. Waidanis (1908) 1 Ch. 123. A testatrix by her will devised and bequeathed property to the person or persons who should at her death be trustees of her father's will. At that time all the trustees named in her father's will, and all the trustees who had been appointed in their place were dead. The executors of the last surviving trustee of her father's will, had acted in the trusts of her father's will, and these executors, Eady, J., held, were the duly appointed trustees of the will of the testatrix.

CHARITY—GIFT FOR CHARITABLE OR EMIGRATION USES—UNCERTAINTY.

In re Sidney, Hingeston v. Sidney (1908) 1 Ch. 126. Eady, J., held that a gift of personalty for "such charitable uses, or for such emigration uses, or partly for such charitable uses, and partly for such emigration uses" as the trustees shall think fit, is not a good charitable gift, and is void for uncertainty; because where a gift includes purposes which may or may not be charitable, and a discretion is vested in trustees, the whole gift is void for uncertainty. In the present instance emigration purposes was not necessarily confined to the assisting of poor persons.

WILL—TESTAMENTARY EXPENSES—LEGACIES CHARGED ON LAND—
ESTATE DUTY.

In re Cooper, Poe v. Cooper (1908) 1 Ch. 130. Eady, J., held that where a legacy is given out of a mixed fund or residue, it is thereby charged rateably on the portions attributable to realty and personalty and that notwithstanding a direction to pay "testamentary expenses" out of the mixed fund, the estate duty in respect of the share of the legacy payable out of the realty, must be borne by the legacy.

ESTATE DUTY—EXERCISE OF TESTAMENTARY POWER OF APPOINTMENT—NO DIRECTION TO PAY TESTAMENTARY EXPENSES.

In re Orlebar, Wynter v. Orlebar (1908) 1 Ch. 136. Neville, J., in this case holds that where a testator by his will in the exercise of a general testamentary power, appoints personal property, the estate duty in respect of the appointed property is payable not out of that property, but out of the testator's general personal estate—following in this respect, Buckley, and Eady, JJ., in preference to Kekewich, Byrne and Warrington, JJ.

COMPANY — WINDING-UP — CONTRIBUTORY — ASSIGNMENT OF SHARES TO ESCAPE LIABILITY.

In re Discoverers Finance Corporation (1908) 1 Ch. 141 was an application by the liquidators of a company being wound up to rectify the list of contributors, by placing on it the name of the transferor of certain shares in lieu of that of his transferee to whom they had been transferred for the purpose of escaping liability, the shares not being fully paid. Parker, J., on the facts being satisfied that the transfer was not bona fide, gave the relief asked.

INSURANCE — RE-INSURANCE — RECOVERY BY INSURED OF LOSS FROM THIRD PARTY—SUBROGATION—EXPENSES OF RECOVERY FROM THIRD PARTY.

Assicurazioni Generali de Trieste v. Empress Assurance Corporation (1907) 2 K.B. 814. In this case the plaintiffs had entered into a contract of reinsurance with the defendants, and a loss having occurred the plaintiffs paid the amount of the policy £1,354 4s. 10d. to the defendants. Subsequently the defendants, by action of deceit against third persons, recovered the moneys which they had paid on the policy of insurance granted by themselves as having been obtained by means of fraudulent representations. The amount so recovered by the defendants included the £1,354 4s. 10d. for which they had been reinsured by the plaintiffs. The plaintiffs claimed that they were entitled to be subrogated to the rights of the plaintiffs in respect of this sum and claimed to recover it in this action as money had received to the use of the plaintiffs. Pickford, J., who tried the action held that upon the principles laid down by Brett and

Bowen, L.JJ., in *Castellain v. Preston* (1883) 11 Q.B.D. 380, the plaintiffs were entitled to succeed, but that the defendants were entitled to deduct from the amount recovered from the third parties their reasonable expenses of recovering the same.

INTERPLEADER—EXECUTION—GOODS BELONGING NEITHER TO EXECUTION CREDITOR NOR CLAIMANT—MONEY PAID INTO COURT—DETERMINATION OF ISSUE IN FAVOUR OF EXECUTION CREDITOR—NOTICE BY CLAIMANT WHOSE RIGHTS ARE ADMITTED.

In *Wells v. Hughes* (1907) 2 K.B. 845, the Court of Appeal regretfully felt compelled to reverse what appeared to be an equitable decision of a Divisional Court (Ridley and Darling, JJ.), and yet for the reasons given by the Court of Appeal (Williams, Moulton and Buckley, L.JJ.), it is hard to see how any other result could follow. Goods were seized in execution, they were claimed by the District Loan Co. under a chattel mortgage made by the execution debtor. The sheriff applied for an interpleaded order, whereupon the Loan Co. paid into Court the amount of the judgment debt, costs and execution fee, to abide the result of an interpleader issue which was ordered to be tried between the execution creditor and the Loan Co. Afterwards a firm of Davies & Co. made a claim to part of the goods which had been seized by the sheriff as lessors under a hire purchase agreement. Notice of this claim was given to both the execution creditor and the Loan Co., and both parties refused to contest the claim. On the determination of the issue the execution creditor claimed to be paid the whole amount of the money in Court, but it was contended that a proportionate part of the money in Court as representing the goods claimed by Davies & Co. should be paid to them. This was so ordered in the County Court, and the decision was affirmed by the Divisional Court; but the Court of Appeal pointed out that what was paid into Court was not the value of the goods seized but merely the amount of the execution creditor's claim, and that his admission of Davies & Co.'s claim was immaterial, as the sheriff had withdrawn from possession.

CRIMINAL LAW—RIOT—WANTON INJURY TO PROPERTY BY BOYS.

Field v. The Receiver of Metropolitan Police (1907) 2 K.B. 853 was an action brought under an English statute to recover for damages done to the plaintiff's property in what was alleged

to be a riot. The facts were that about nine o'clock in the evening a number of boys met together on the pavement adjoining a nine inch wall on the plaintiff's property and that some of them ran against the wall with their hands extended and by their joint efforts a portion of the wall was thrown down to the extent of about twelve feet. As soon as it fell the caretaker came out into the street and the boys ran away in different directions. The Divisional Court (Phillimore and Bray, JJ.), held that this did not constitute a riot and therefore that the plaintiff could not recover. The Court held that to constitute a riot five things must concur: (1) an assembly of persons not less than three, (2) a common purpose, (3) execution or inception of common purpose, (4) intent to help one another by force, if necessary, against any person who may oppose them in the execution of their common purpose, (5) force or violence not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage—we presume it is to be understood that the common purpose must be an unlawful one.

EXTRADITION—DISCHARGE OF CRIMINAL—EXEMPTION FROM PUNISHMENT BY LAPSE OF TIME.

The King v. Governor of Brixton Prison (1907) 2 K.B. 861. This was an application for the extradition of a criminal by the German Government, under the Extradition Treaty between that country and Great Britain. By that treaty it is provided that extradition shall not take place if the person claimed has already been tried and discharged, nor if exemption from prosecution has been acquired by lapse of time according to the laws of the state applied to. The prisoner had been convicted of an extraditable offence in Germany and sentenced to four years' imprisonment. After he had served a part of his sentence he was discharged on the ground that imprisonment would endanger his life, but according to the laws of Germany the discharge was not an absolute discharge from punishment, but a prisoner so discharged is liable, on recovering his health, to be called on to complete his sentence. The prisoner had recovered his health and had been ordered by the Court to surrender himself to prison in order to complete his sentence, but had refused to do so, and escaped to England. A Divisional Court (Lord Alverstone, C.J. and

Darling, and Phillimore, JJ.) held that the prisoner had not been "discharged" within the meaning of the treaty; nor had exemption from punishment been acquired by lapse of time according to the laws of England. His extradition was therefore ordered.

REVENUE — SUCCESSION DUTY — PROPERTY SITUATE ABROAD —
TRUST FOR CONVERSION—LIABILITY TO DUTY.

In *Attorney-General v. Johnson* (1907) 2 K.B. 885 an information was filed by the Attorney-General for the recovery of succession duty in the following circumstances. A testator domiciled in England by his will left the residue of his real and personal estate which included a tea plantation in India, to trustees upon trust to sell and pay certain annuities and subject thereto and until the death of the last surviving annuitant to pay the surplus income to certain persons in equal shares and to the survivor or survivors of them. There was no gift over, either of the income or corpus. The trustees were authorized to postpone conversion and in the meantime to work the tea estate as long as they thought fit, and it was provided that in the meantime the income of that estate should be applied in the same manner as if it were income arising from the proceeds of conversion. The will was proved in England and the trustees resided there; no sale had been effected when two of the persons entitled to share in the income died. The duty was claimed in respect of the amount by which the shares of the surviving cestuis que trustent had been increased by such death. The principal point in controversy was whether, until conversion, the proceeds of the Indian estate were liable to duty. It being contended that as that estate was situate out of England no succession duty was payable in respect of the income thereof; but Bray, J., while conceding that but for the intervention of the trustees and the special directions and powers given to them the income of the Indian estate would not have been dutiable, yet held that the trust for sale given to English trustees had the effect of making the property liable as personal estate would be in their hands, and their postponement of conversion did not alter the case and therefore that the duty was payable as claimed.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.]

[Dec. 31, 1907.]

ATTORNEY-GENERAL FOR ONTARIO *v.* WOODRUFF.

Revenue—Succession duty—Property transfered in lifetime of person domiciled in Ontario—Foreign bonds—Foreign situs—Anticipation of death—Settlements—Succession Duty Act and amendments.

The plaintiff claimed for the Crown succession duty upon moneys and securities, the subjects of two settlements made respectively in 1894 and 1902 by a testator who died in October, 1904, domiciled in Ontario.

In 1894 the testator had a quantity of debentures of municipal corporations in the United States, which had always been retained and managed for him in the United States by his agents there. The documents had been kept by the testator in a leased vault in New York. The testator procured each of his four sons to execute a trust deed in favour of a New York trust company whereby these debentures were transferred (in four portions) to the company in trust to manage, invest, etc., and to pay over the income to each son during his life, and upon his death in trust for his children. The testator went to New York, obtained the debentures from the vault, separated them into four parcels, and delivered them with the trust deeds to the company. The interest was from time to time remitted by the company to the sons, and the sons transferred the cheques therefor to the testator, who gave each of the sons \$750 half-yearly, and retained the balance.

Held, MEREDITH, J.A., dissenting, that the effect of this first settlement, made in the State of New York, of property then locally there, where it had ever since remained, the testator having completely parted with the legal title to the property, which

thereupon became at once, and remained, vested in the trustees residing there, where the trusts were and were intended to be carried into execution, was to give the property settled a permanent foreign situs, to remove it completely from the control of the law of the domicile of the testator, and to render it in future subject only to the law of the State of New York; and for this reason, and for the additional reason that the Succession Duty Act, as it stood when that settlement was made, did not include or affect such a settlement, the property settled was not subject to succession duty.

The settlement of 1902 comprised certain cash on hand in New York and other property of a character similar to that in the previous settlement, locally situated wholly in the United States. The debentures were kept in the same vault, of which the testator had the key. When about to make this settlement, the testator wrote to his New York agents authorizing them to transfer his account from his name to the names of three of his sons, adding, "I wish to have my affairs in good shape, as I have not been feeling very well of late"; and shortly afterwards executed a document whereby he purported to transfer to his four sons the cash and debentures, in trust for his wife, and after her death to be divided equally between the four sons, subject to a charge for the education of two grandchildren. This settlement was made at a city in Ontario, where the testator, his wife, and three of his sons resided. The agents transferred the account to the names of the three sons, and notified them and the testator that they had done so; and it was arranged that access to the vault in which the debentures were kept could be secured only by the three sons and the wife, and thereafter the annual receipts for the rent of the vault were given in the name of the wife. No remittance of income to Ontario was ever made by the New York agents under the second settlement, nor any other definite action of any kind taken by the trustees to realize or get in the trust property in the lifetime of the testator.

Held, that the property settled was subject to succession duty.

Construction of the Succession Duty Act and amendments.

Judgment of FALCONBRIDGE, C.J.K.B., affirmed as to the first settlement and reversed as to the second.

DuVernet and *Ingersoll*, for plaintiff. *W. Nesbitt*, K.C., and *Collier*, K.C., for adult defendants. *Frank Ford*, for infant defendants.

Full Court.]

[Dec. 31, 1907.]

LUMSDEN v. TEMISKAMING, ETC., RAILWAY COMMISSION.

Railway—Damages “sustained by reason of the railway”—Timber cut for construction—Trespass—Limitation of actions—Plans not filed.

The defendants were incorporated by 2 Edw. VII. c. 9 (O.), which provides that they shall have in respect of the railway all the powers, rights, remedies and immunities conferred upon any railway company by the Railway Act of Ontario. The latter Act, R.S.O. 1897, c. 207, s. 42, provides that “all actions for indemnity for damages or injury sustained by reason of the railway, shall be instituted within six months next after the time of the supposed damage sustained.” The defendants (the railway commission and a contractor under them), before the filing of the plans of the railway, and in the course of constructing it, entered upon the timber limits of the plaintiffs and cut timber for construction purposes. These acts ceased much more than six months before the commencement of this action, brought to recover damages for the trespass and for the value of the timber.

Held, following *McArthur v. Northern and Pacific Junction R.W. Co.* (1888-90) 15 O.R. 733, 17 A.R. 86, that the plaintiffs’ claim was for damages sustained by reason of the railway, and was barred by the statute; and it made no difference that the commission had not filed the plans of their railway or taken the necessary steps to compensate those whose lands or interests they entered upon or affected.

Judgment of RIDDELL, J., affirmed.

G. F. Henderson, for plaintiffs, appellants. *D. E. Thomson*, K.C., for Railway Commission. *J. H. Moss*, for defendant Macdonnell.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P., MacMahon, J., Anglin, J.]

[Jan. 2.]

LABELLE v. O’CONNOR.

Vendor and purchaser—Contract—Purchase money payable by instalments—Time of essence—Default—Waiver—Rescission—Notice—Specific performance—Return of money paid—Deposit—Forfeiture.

By an agreement in writing made between the parties on the

25th May, 1905, the defendants agreed to sell land to the plaintiff for the price of \$290; the purchase money was to be paid in three instalments, the first of \$100, which was to be (and was) paid down; the second of \$75, which was to be paid in five months and three weeks, and the third, of \$115, in eleven months and three weeks, and the latter two instalments were to bear interest at six per cent. until paid. The plaintiff was to be entitled to possession until default, and was to pay the taxes after the date of the agreement. The agreement was on a printed form, and one of its printed provisions was: "And it is expressly understood that time is to be considered the essence of this agreement, and unless the payments are punctually made at the time and in the manner above mentioned, the defendants are to be at liberty to resell the said lands." The plaintiff was given the privilege of paying the residue of the purchase money at any time, and the defendants were to convey when the whole purchase money should be paid. According to the evidence, the time for the payment of the plaintiff's purchase money was arranged to correspond with the time when the defendants were required to make payments to one R., from whom they had purchased the land, with the object that they should be able to pay R. with the money which the plaintiff should have paid them. The second instalment of the plaintiff's purchase money fell due on the 15th November, 1905, and was not paid. In the following December the plaintiff asked O'Connor, the husband of one of the defendants, for a delay of two or three weeks, saying that at the end of that time he would pay the purchase money in full. O'Connor said that it would be necessary to consult the other defendant, and that he would let the plaintiff know by mail whether they would accede to his request. Not having received any word from O'Connor, the plaintiff waited until February, 1906, when he wrote to the defendants asking for his deed and telling them that he was ready to pay the purchase money in full with interest. To this and to two subsequent letters no reply was received. In April the plaintiff saw O'Connor, who said that the plaintiff would have to lose the \$100, and that the defendants would "stick to the lots and the money as well." A formal tender was made and refused on the 23rd April, and this action for specific performance was begun on the 23rd May:—

Held, MEREDITH, C.J.C.P., dissenting, that, in the absence of fraud, accident or mistake, the provision that time should be of the essence was binding upon the plaintiff, and had not been waived by the defendants; that the latter had the right to rescind upon default in payment of the second instalment; that no formal notice of rescission was necessary; and that the plaintiff was not entitled to specific performance. *Barclay v. Messenger* (1874), 22 W.R. 522, 43 L. J. Ch. 449.

In re Dagenham Dock Co. (1873), L.R. 8 Ch. 1022, and *Cornwall v. Henson*, (1899) 2 Ch. 710, (1900) 2 Ch. 298, followed.

Held, also, that the \$100 paid by the plaintiff, not being a deposit, but an instalment of the purchase money, was not forfeited, but was returnable to the plaintiff upon rescission, and he should be allowed credit for it upon the costs ordered to be paid by him.

Judgment of TEETZEL, J., reversed.

Gamble, for defendants. *J. Bicknell*, K.C., and *A. B. Morine*, K.C., for plaintiff.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [Jan. 20.

IN RE WILSON AND TORONTO GENERAL TRUSTS CORPORATION.

Executors and trustees—Accounts—Surrogate Court—Approval by judge—Fraud or mistake—Items of overcharge—Application to re-open accounts—Re-opening limited to items proved—Refusal to re-open generally—Surrogate Courts Act—Jurisdiction—Costs.

A petition by the cestui que trust to the judge of a Surrogate Court to set aside an order made by him upon the passing of the accounts of the trustees and to re-open the accounts, was dismissed with costs, subject to the petitioner being allowed to surcharge the accounts of the trustees upon two items, viz., premiums paid by the trustees for fire insurance, from which they should have deducted rebates or commissions allowed to them by the insurance companies, and an overcharge of one cent a share upon a purchase of 3,000 shares of mining stock by the trustees:—

Held, affirming the judgment of the judge of the Surrogate Court (York), that he had properly refused to open up the accounts in regard to the purchase of the mining stock referred to, in regard to an alleged overcharge of interest, in regard to the sale of a property without notice to the petitioner, in regard to certain mortgage accounts, and in regard to other matters.

It was contended for the petitioner that the non-disclosure of the fact that the rebates had been allowed amounted to fraud on the part of the trustees entitling the petitioner to have the accounts re-opened and taken de novo, and that, at all events, coupled with the overcharge as to the mining stock, she was so entitled.

The accounts approved by the Judge were brought before him under the provisions of section 72 of the Surrogate Courts Act, as amended by 2 Edw. VII. c. 12, s. 11, and 5 Edw. VII. c. 14, s. 1:—

Held, that, under that section, it is only *so far as* mistake or fraud is shewn, and not where mistake or fraud is shewn, that the binding effect of the approval is taken away; and the language of the section plainly indicates that it was not intended that the whole account should be opened up, but that the account should be opened up so as to remove from it anything which, owing to fraud or mistake, had not been charged or had been allowed to the accounting party. The principle applicable to the opening of an ordinary stated account, and the consequences of such an account being opened, do not apply to an account taken by the Court in the presence of the parties, where the persons to whom the accounting is being made are brought before the Court for the purpose of enabling them to challenge, if they will, the correctness of the account.

While the failure to credit the rebates was not due to a mere accidental omission of them from the account, the intentional retention of the small sum not credited, apparently under the mistaken idea that the trustees were entitled to it, did not amount to fraud, or at all events, not to such fraud as would entitle the petitioner to the relief which she claimed or to any further relief than that given to her by the order of the judge.

The petitioner should not have been ordered to pay all the costs of the trustees in the Court below, as she had succeeded to a trifling extent. No costs of the appeal were allowed to either party, but without prejudice to the trustees' right to

claim their costs as proper disbursements in accounting thereafter to the petitioner.

F. E. Hodgins, K.C., and D. T. Symons, for the appellant, the petitioner. *G. F. Shepley, K.C., and J. H. Moss*, for the respondents, the trustees.

Meredith, C.J., MacMahon, J., Teetzel, J.]

[Jan. 21.]

RE TOWNSHIP OF WILLIAMSBURG AND UNITED COUNTIES OF STORMONT, DUNDAS AND GLENGARRY.

Municipal corporation—Bridge—Maintenance.

Appeal from an order made by the senior judge of the County Court of the United Counties. The question was whether the bridge under discussion was a bridge over 300 feet in length within the meaning of section 617 of the Con. Mun. Act 1903; and whether enough of the travelled road east and west of the structure, 44 feet in length to make up 300 feet, formed part of the bridge.

Held, that the travelled road being above rather than for the purpose of bridging the stream it was not to be considered as part of the bridge, (see *Re Mudlake Bridge*, 12 O.L.R. pp. 161-2). The general law casts upon local municipalities the duty of maintaining roads and bridges within their limits, and the respondents do not bring themselves within the exception.

Appeal allowed.

Macintosh, for appellants. *Hilliard*, for respondents.

Anglin, J.] FOX v. CORNWALL STREET RAILWAY CO. [Jan. 21.]

Street railways—Duty as to highways—Wearing down—Liability of municipality.

Plaintiff claimed damages for injury sustained by being thrown from his waggon, the front wheel of which came in contact with the rails of the defendants, due to the wearing down of the adjacent portion of the highway.

Held, that the rails must be taken to have been properly laid in the first instance, in compliance with s. 20 of R.S.O.,

1897, c. 208, as nearly as possible flush with the street so as to cause least possible impediment to ordinary public traffic. Having ceased to meet this requirement by natural means,—the right of maintaining and repairing highways is by statute and by the common law incumbent upon the municipality, and not on the defendants.

Action dismissed with costs.

Gogo and Harkness, for plaintiff. *MacLennan*, K.C., and *Cline*, for defendants.

Boyd, C., Anglin, J., Mabee, J.]

[Jan. 23.

BARKER v. FERGUSON.

Landlord and tenant—Partial lease—Injury to tenant's goods.

This was an appeal by plaintiff from the judgment of the District Court judge of Nipissing, dismissing an action for damages for injury to goods caused by the non-repair of premises demised to plaintiff, on which goods were placed.

Held, that a landlord incurs no liability to a tenant for any defects or accident unless he has contracted to keep the premises in repair.

Kilmer, for plaintiff. *J. M. Ferguson*, for defendant.

Anglin, J.]

REX EX REL. BECK v. SHARP.

[Feb. 27.

Practice—Examination—Municipal election—Quo warranto—Cross-examination on affidavit—Master in Chambers—No jurisdiction to order examinations before anyone but himself.

This was an appeal by the defendant from the Master in Chambers who ordered the defendant and another to attend before the local registrar at Brampton to submit to cross-examination upon their affidavits filed in answer to application to unseat the defendant as a member of the Brampton Town Council.

Without obtaining any direction in that behalf from the Master, the solicitor for the relators procured from the local

registrar an appointment to cross-examine the deponents, proceeding under Con. Rules 490, 492:—

Held, having regard to the provisions of section 232 of Mun. Act, 1903, that, notwithstanding the broad language of Rule 490, it should not be held applicable to proceedings to contest the validity of municipal electors. Section 232 contemplates that whatever oral testimony is taken, whether it be evidence of witnesses who have not made affidavits, or cross-examination of affiants, it should be taken before the judicial officer who is to determine the validity of the election. There was no right on the part of the relators to issue an appointment for this cross-examination without leave of the Master in Chambers first obtained; and the Master had no authority to direct cross-examination of affiants to be taken before any officer other than himself.

Appeal allowed.

T. J. Blain, for appellant. *W. E. Middleton*, K.C., for the relators.

Boyd, C., Anglin, J., Mabey, J.]

[Jan. 31.

WILLIAMS v. CRAWFORD TUG CO.

Company—Power of to give guarantee—Implied powers.

The owner of a tug employed by the defendants requiring a new boiler obtained one from the plaintiffs on the faith of a guarantee given by the defendants for the price of the boiler. An action being brought upon the guarantee in the 8th Division Court of the County of Bruce the county judge held that the contract was ultra vires of the company and dismissed the action.

Held, per BOYD, C.:—"Giving a guarantee by a joint stock company incorporated to do defined things, to answer for the debt of a person who does work for them, if not within the general or special powers of the company, must be justified on the ground that it is incidental to the main purposes—that there is a potential necessity for entering into the guarantee, and that therefore there is a reasonable implication of power to do it. I use expressions drawn from the language of Lord Selborne in *Small v. Smith*, 10 App. Cas. pp. 123. See also *Brettel v. Williams*, 4 Ex. 632."

Middleton, for plaintiffs. *Jennings*, for defendant.

COUNTY COURT—HALDIMAND.

DOUGLAS v. GRAND TRUNK RY. CO.

Railway—Cattle on track—Liability—Fences.

The plaintiff's heifer, while escaping from the stable of an hotel adjoining the defendants' railway, got on to the railway track through a hole in defendants' fence, and finally reached a bridge, and, in its attempt to cross over, fell from it and had to be slaughtered.

Held, following *Young v. Erie & Huron Ry. Co.*, 27 O.R. 530, that damages were not recoverable as any neglect or non-observance by the railway is provided for by 53 Vict. c. 28, s. 2(D.), and is limited to injury caused to animals by the company's trains and engines; and, further, that there being no common law liability to fence, the obligation is to be measured by the language of the statute. See *James v. Grand Trunk Ry. Co.*, 10 O.L.R. 127. Judgment for defendants, but without costs.

[Cayuga, Jan. 14—Douglas, Co. J.]

The facts of the case are sufficiently set forth above.

Arrell, for plaintiff. The defendants were negligent in not maintaining their fence as required by law, and were therefore responsible in damages under the provisions of section 427 of the Railway Act. See, also, sections 4, 254, 294 and 295.

W. E. Foster (now of Montreal), for defendants. Section 427 does not apply, because the remedy is provided by the special Act, 16 Vict. c. 37, s. 2.

DOUGLAS, Co. J.:—At the time that *Young v. Erie & Huron Ry. Co.*, 27 O.R. 530 was decided, there was a provision in the Railway Act similar to section 427 of the present Railway Act, and I feel that I am bound by the decision of the Chancellor in this case. His Lordship says: "As to damages found by the jury in respect of the trouble incurred in watching cattle on account of the bad state of the fences, I do not think these are recoverable as a consequence of the neglect on the part of the company to observe the directions of the statute. The penalty that follows non-observance is given by the statute 53 Vict. c. 28, s. 2(D.), and it is limited to injury caused to animals by the company's trains and engines. There is no common law liability to fence, and the obligation being imposed by statute, the responsibility is to be measured by the language of the statute." Osler, J., seems to agree with this view in *James v. Grand Trunk Ry. Co.*, 10 O.L.R. 127.

Then has the Railway Act since that time been so changed as to increase the responsibility of railway companies in this respect? I cannot find such a change in the Railway Act, although no doubt their responsibilities have been made greater by reason of the present provision as to cattle at large, and as to cattle guards at highway crossings. I cannot give effect to the argument of counsel for defendants when he argues that the plaintiff's servant negligently allowed the animal to escape from the hotel stable. Had it not been for his admission that the defendants would have been liable if the heifer had been killed by the defendants' trains or engines, I would have submitted the whole of the questions involved to the jury.

I think, therefore, the plaintiff must fail in his action, but, under the circumstances, without costs.

DIVISION COURT—ELGIN.

COLLINS *v.* SMITH.

CAMPBELL *v.* McWILLIAMS.

*Master and Servant—Verbal contract—Statute of Frauds—
Desertion—Wages.*

The question was whether a servant who abandoned a special contract which was unenforceable under the Statute of Frauds could maintain suit on a quantum meruit to recover the value of his services for part of the term during which he had served. Both defendants pleaded breach of contract by the plaintiffs as a complete defence.

Held, A yearly servant wrongfully quitting his master's service forfeits all claim for wages for that part of the current year during which he has served.

[St. Thomas, Feb. 3—Ermatinger, Co. J.]

The question presented on the evidence was whether a servant who abandoned a special contract which was unenforceable under the Statute of Frauds could maintain a suit on a quantum meruit to recover the value of his services for the part of the term during which he had served.

Faulds and Duncan, for plaintiffs. *Crothers*, K.C., and *Leitch*, for defendants.

ERMATINGER, CO. J.:—The doctrine laid down by the English decisions is that the contract, though unenforceable by reason of the statute is still a subsisting contract. Though an action cannot be brought upon the contract, it still exists, with the result that no new contract can be implied from Acts done in pursuance of it: *Smith on Master and Servant*, 5th ed., p. 31.

An action cannot be maintained by a master against a servant for quitting his service, nor by a servant against his master for wrongful dismissal, where the requirements of the statute have not been complied with, because such actions would be based upon the contract which the statute declares unenforceable: See *Snelling v. Huntingfield*, 1 C. M. & R. 19; *Harper v. Davies*, 45 U.C.Q.B. 442. An action may, however, it seems, be maintained by the servant against the master in case of wrongful dismissal of the former, for his services as upon a quantum meruit: *Snelling v. Huntingfield*; *Brittain v. Rossiter*, 11 Q.B.D., at p. 133; *Leake*, 4th ed., 200. It is when we come to consider the case of the servant quitting his service without justifiable cause that there would appear to be a dearth of authority both here and in England in favour of the enforcement of a claim for services rendered under a contract unenforceable by reason of the Statute of Frauds.

As already said no new contract may be implied when there is already an existing though unenforceable contract: *Brittain v. Rossiter*; *Harper v. Davies*, ante. From that point of view it is rather hard to see the distinction between cases where the servant has been dismissed and where he has voluntarily abandoned the service under the unenforceable contract. It was even suggested on the argument that Lord Lyndhurst's dictum in *Snelling v. Huntingfield* does not bear out the dictum of Thesiger, L.J., in *Brittain v. Rossiter*, and statements of text writers, in favour of a servant's right to recover in the former case.

It seems, however, to be assumed to be the law in England that where the servant has been wrongfully dismissed or where illness prevents his completing his term of service, he may recover for the services rendered, notwithstanding the statute. But no English or Canadian case has, though counsel have searched diligently, been found to authorize his recovering for his services where he has abandoned his employment voluntarily under a contract unenforceable under the statute.

Though there is apparently a lack of authority in our own and the English Courts upon this latter question, the same cannot be

said of American Courts, though the decisions in several States seem very conflicting. The authors of the 9th American edition of Smith's Leading Cases, at page 602 (vol. 1), say: "Though no action could be brought on the oral contract not to be performed within a year, has this sufficient vitality to constitute a valid defence? In accordance with the "void" theory of the Statute of Frauds it has been decided in Maine, Massachusetts and Connecticut that such an oral contract constitutes no defence. The Statute is held to be a bar even to its indirect enforcement. Thus in *Comes v. Lawson*, 16 Conn. 246, where the plaintiff by oral agreement bound himself to serve the defendant for a term longer than one year, for a consideration to be paid at the end of that time, and, having repudiated the contract, and quitted his employer at the end of six months, brought his action to recover the value of the services so rendered, the Court held that he could recover and that the defendant could not set up the verbal agreement in defence: *Clark v. Terry*, 25 Conn. 395; *King v. Welcome*, 5 Gray 41; *Freeman v. Foss*, 145 Mass. 361 (1887); *Bernier v. Cabot Mfg. Co.*, 71 Me. 506. But see *Mack v. Bragg*, 30 Vt. 571; *Swanzy v. Moore*, 22 Ill. 63, contra." (See also Browne on the Statute of Frauds, 5th ed., pp. 145-6, 150-1.)

The case last cited was very similar in its facts to the cases before me.

[The learned judge then quoted from the American and English Encyclopedia (2nd ed., vol. 29, sub nom. "Verbal Agreements," p. 836) which summarizes the result of the decisions, from *Swanzy v. Moore* (Ill), already referred to, remarking that the reasoning in the latter case commends itself rather than that contained in the judgments of the other State Courts already referred to. The Illinois case seems based on common sense, upon which the law is said to be founded, and to conform to the well-known maxim that a man may not take advantage of his own wrong.]

If the English Courts have been silent on the point it may perhaps be urged that that is evidence that the principle was too plain to be called in question.

Harper v. Davies, 45 U.C.Q.B. 442, is the only case in our own Courts that was cited which touches the point in question here. Though it was urged that Armour, C.J., had decided there would be no recovery for services in a case within the statute, he appears to have based his decision on *Brittain v. Rossiter* in which Thesiger, L.J., recognizes the right of a servant wrongfully dismissed to recover for services rendered, though not for

the wrongful dismissal. In *Harper v. Davies* the right to recover on the common counts, which included a claim for work and labour, seems to have been recognized. It is probable, however, that the learned Chief Justice would have explicitly denied the right to recovery by a plaintiff who was in default, had such a case been before him.

It was contended the plaintiff in the latter of the two cases before me had the right to terminate this contract, if it existed, by a month's notice, according to the well-known rule applicable to domestic servants, and if that were the case the deduction of a month's wages might be made in lieu of the month's notice which was not given. Apart from the question as to whether a farm labourer is a domestic servant (as to which see note (b) to *Snelling v. Huntingfield*, 1 C. M. & R.), this contention fails for another reason. The law is thus stated in *Smith's Master and Servant*, 5th ed., p. 65, after a statement of the rule as to the month's warning by domestic servants. "But it is conceived to be perfectly clear, notwithstanding a notion to the contrary, which is believed to be not uncommon, that a domestic or other yearly servant wrongfully quitting his master's service forfeits all claim for wages for that part of the current year during which he has served and cannot, after having wilfully violated the contract according to which he was hired, claim the sum for which his wages would have amounted had he kept his contract, merely deducting therefrom one month's wages." A passage follows as to the injustice which would result from a contrary rule, as to which see also *Blake v. Shaw*, 10 U.C.Q.B. 180.

Judgment will be entered for the defendant in both cases with costs.

Province of Nova Scotia.

SUPREME COURT.

Full Court.]

THE KING v. ROMANS.

[Feb. 8.

Criminal law—Code s. 212—Seduction under promise of marriage.

Defendant who had entered into an engagement to marry E., some time afterward seduced her. The engagement to marry was referred to at the time, and the promise to marry repeated, and

defendant further promised that in the event of E. getting into trouble he would marry her before anyone knew about it.

Held, reversing the decision of the County Court judge for District No. 3, that the promise of marriage was a continuing one until the event took place, and that the existence of the promise, renewed by the defendant as an inducement to E., came within the meaning of the Code s. 212.

J. J. Power, K.C., for the Crown. *Nem con.*

Province of British Columbia.

COUNTY COURT.

Howay, Co. J.]

McLEAN v. DOVE.

[Jan. 4.]

County Court—Practice — Costs — Review of taxation — Scales “over \$10 to \$25” and “over \$250 to \$500”—Amount recovered by means of the action.

Plaintiff claimed \$333.19 for certain cattle sold to defendant, who pleaded tender of \$300 and payment into Court, and not indebted as to the remainder of the claim. Judgment for plaintiff was given for \$250. The taxing officer allowed costs on the scale “over \$250 to \$500.”

Held, on review of the taxing officer’s ruling, that the amount recovered by means of the action being only \$20, the costs should have been taxed on the scale “over \$10 to \$25.”

Reid, for the application. *Bole*, K.C., *contra*.

Book Reviews.

Manual of the Law of Evidence for the use of Students. By SYDNEY L. PHIPPSON. London: Stevens & Haynes, Bell Yard, 1908.

This volume of 208 pages is an abridgement of the 4th edition of the author’s general treatise upon the same subject. It is a concise compendium of the law and will be useful not only to students but to practitioners also. The name of the author is a sufficient recommendation.

Students' Guide to Roman Law (Justinian and Gaius). By DALZIEL CHALMERS and L. H. BARNES. London: Butterworth & Co., Bell Yard, 1907.

The authors have apparently satisfactorily complied with what they express to be their belief that there is a need for a concise and simply worded text book which will serve as an introduction to the standard authorities on the subject of Roman law. For those who desire a general view of this great system of law they cannot do better than read this book, which, by the way, is in the best style of workmanship of this well-known publishing house.

A New Guide to the Bar. By LL.B., Barrister-at-law. 3rd ed. London: Sweet & Maxwell, Ltd., 3 Chancery Lane, 1908.

This volume contains the most recent regulations and examination papers of the Inns of Court, with a critical essay on the present condition of the Bar of England. A very useful compendium for law students in the British Isles; and some of its chapters are interesting to Colonial students.

Martin's Mining and Water Cases of British Columbia, with Statutes. Toronto, Canada: Carswell Co., Ltd., 1908.

We are in receipt of part 2 of the 2nd volume of these reports, edited by Hon. Mr. Justice Martin, one of the judges of the Supreme Court of British Columbia, and Judge of the Admiralty for that Province. This series of reports gives the decisions on mining cases and cases under the Consolidation Act of British Columbia from the earliest times up to January 1, 1908, in all the Courts and from the trial up to the Privy Council. The statutes affecting the subjects discussed in this judgment are to be found in this volume. The whole makes a full compendium of the law on matters necessarily much in evidence in our Pacific Province.

Principles of Company Law. By ALFRED TOPHAM, Barrister-at-law. Second Edition. London: Butterworth & Co., Bell Yard.

This book is a useful one doubtless to those who have to deal with the Company Law of the British Isles; especially as it puts the practitioner on the right track as to the many ramifications of this important branch of law by reference to the sections of the statutes and the leading cases. Our statute law is so different in this country that Mr. Topham's book is not of so much value here, but one written on the same lines here would be very useful.

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THE BOARD OF RAILWAY COMMISSIONERS.

A little more than four years ago the Board of Railway Commissioners for Canada came into existence. Of the three original members, two still remain. Mr. Justice Killam, of the Supreme Court of Canada, became chief commissioner in the place of the Hon. A. G. Blair, who resigned. The strength that Mr. Blair brought to this railway court was well continued by Mr. Killam, whose judicial training was invaluable as the chief justice of a Court of which the other two members were laymen. The latter, however, now have experience which should enable them to give useful and practical decisions in accord with the growing condition of railway affairs in this country.

For a long time previous to the lamented death of Mr. Killam, it had been manifest that the Board was unable to cope with the work which was devolving upon it, and the Board is now three months behind in its work. This is not necessarily any reflection on the care and labour bestowed by the non-legal members of the Commission upon matters brought before them, but it is not to be expected that they would possess that acumen in giving decisions on questions which to a lawyer or trained mind would involve little doubt. Without, then, considering whether or not there was any inherent weakness in the Board, we find that its work had increased to such a point that its usefulness was impaired. The chief cause of this is the increased power that has already been conferred upon it by statute, while the continued growth of railways in Canada has added year by year a larger field. As the railways spread, questions of crossings become more frequent, rates have to be settled and transportation matters to be dealt with. Owing to this increase in the business of the Commission many important matters have

been shunted or side-tracked until a more convenient season—which often did not arrive.

In our issue of October 15, 1907, we referred to the diversity of forms of bills of lading in use, and we then said:—“Whilst this matter should have been attended to long ago, the Board may, possibly with some reason, seek to excuse itself on the ground of the pressure of the work in relation to other matters of great importance in various parts of the Dominion. If this means that the Board as at present constituted is not equal to the strain of work laid upon it, the necessary changes must be made in its personnel, or more members must be added.” The Government has recognized the need of strengthening the Court numerically, and it has now an opportunity to make the Board strong in calibre as well as numbers.

On February 27, the Minister of Railways introduced a bill to amend the Railway Act as respects the constitution of the Board of Railway Commissioners. This bill increases the number of commissioners to six, and the Board is empowered to hold more than one sitting at the same time. The Board will now consist of a chief commissioner, an assistant chief commissioner, a deputy chief commissioner, and three ordinary members. The chief commissioner and the assistant chief commissioner must each be or have been “a judge of a superior court of Canada or of any province of Canada, or a barrister or advocate of at least ten years’ standing at the bar.” The bill then regulates the powers of the assistant chief and deputy chief in the absence of the chief commissioner. Another clause, debated at length in the House upon the introduction of the bill, is as follows:—“The chief commissioner, when present, shall preside, and the assistant chief commissioner, when present, in the absence of the chief commissioner, shall preside, and the opinion of either of them upon any question arising when he is presiding, which, in the opinion of the commissioners is a question of law, shall prevail.”

An agent’s book must now be kept in the office of the secretary of the Board, in which railway companies must enter the

name and address of an Ottawa agent, where he may be served, for the company, with any notice, summons, regulation, order, direction, decision, report, or other document, and the Board may direct that the fact of service upon an agent and the nature of a document served shall be communicated to the company by telegraph.

There is, as yet, no provision for an appeal from one commissioner, or from two commissioners sitting together, to what might be termed a "Full Board." The desirability of a right of appeal to the Board itself has not yet been determined.

The appointment of a lawyer as assistant chief commissioner, ranking next to the chief commissioner, will enable the assistant chief to preside over a division of the Board in which the other members are not lawyers. In introducing the bill, the Minister said, referring to the new position of assistant chief commissioner:—"It has been found absolutely necessary that the head of that Board, the chairman conducting its affairs, should be a legal man with power to grasp the legal situation, with a firm grasp of the Railway Act." If both the chief commissioner and the assistant chief commissioner are present at a sitting, and disagree upon a question of law, the ruling of the chief would prevail. The evident intention is that in all possible cases either the chief or the assistant chief shall preside. This is a wise provision.

The question of costs in cases before the Board received some attention in the discussion, as did also the question of counsel to represent parties opposed to the railway companies. The latter suggestion would seem to lead to multiform complications, and savours of a form of democracy which does not, at the moment, appeal to us.

We feel assured that His Majesty's advisers will be mindful that this is, perhaps, the most important Court, and possesses wider powers than any Court in Canada, and that it is not a political shelf. At the time the creation of a Commission was mooted it was said—unofficially no doubt—on the part of the Government, that the intention was to appoint three mem-

bers, one a lawyer, one a business man, and one a railway man. Only the first of these good intentions was fulfilled. Now would appear to be a suitable opportunity to give the Commission, more fully, the confidence of the people. We would prefer to see three lawyers in this Court of six members, for, whether it be the home section or a travelling section of the Court, there should be a competent legal member always present to decide questions of law.

As to what sections of the community the other two new commissioners should represent, very many suggestions have been made, e.g., railway men, business men, manufacturers, shippers, telegraphers, farmers, mechanics and railway employees, but it seems most important that a man with railway experience should be a member of the Board. There is nothing in the argument frequently advanced that such a man would be influenced in favour of railway companies; while, on the other hand, his technical knowledge of the workings of railways would be of inestimable value in assisting the Board to arrive at a proper conclusion. One familiar with transportation would be a useful member. We hope to find that all the new members are practical men, and we fail to see why any section of the community should be represented other than lawyers, railway men and business men. These three seem to combine all the necessary requirements of a competent Board.

The death of the Chief of the Railway Commission, in addition to delaying and crippling the general work of that body, may be realized in a definite way in connection with the Bell Telephone investigation, in which the late Chief had heard an enormous amount of evidence and was preparing his judgment. It is possible that the evidence may have to be reheard, although by consent of the parties this will be unnecessary. At the time of Mr. Blair's resignation the Fort William telephone case, and others, were in a similar position, and it was

agreed that Mr. Killam might proceed without a rehearing of the evidence. Mr. Killam was also chairman of the arbitration committee which has, for several years, been attempting to arrange the differences between the Intercolonial and Grand Trunk Railways. The evidence in this matter already fills some eight volumes, and it was only ten days before his death that he urged counsel to endeavour to expedite the matter so that the committee might be relieved of its duties.

THE BENCH IN BRITISH COLUMBIA.

The administration of justice demands that an end shall be put at once to such objectionable exhibitions as have recently been witnessed on the Bench in British Columbia. The Government should take the matter in hand, and apply such remedy as may seem appropriate.

For some time past there has been friction between Chief Justice Hunter and Mr. Justice Martin; and, as to this, the feeling of the Bar in that Province is in favour of the former. This friction has been evidenced by various incidents from time to time, and has culminated in the one hereafter referred to.

The important facts of the most recent of these episodes are simple. By a rule of Court it is the duty of the chief justice to arrange all sittings of the Supreme Court, whether civil, criminal or appellate, and to assign these sittings to such judge or judges and in such manner, as may, in his opinion, be necessary or proper, and generally he has power to control and direct the business of the Court, and it is the duty of the judges to carry out such directions as the chief justice may make.

The Rule also provides that only those judges shall sit in any appeal who are so assigned, and that not more than three judges shall sit in any appeal unless specially summonsed.

It appears that Mr. Justice Martin had, under the above rule, been assigned by the chief justice to sit as one of the judges appointed to hear an appeal in the case of *Hunting v.*

McAdam. This assignment was subsequently, on November 27, cancelled by direction in writing from the chief justice, to the effect that Mr. Justice Martin should take the sittings at Nelson and Rossland, and that the other judges should hold the Special sittings in February, at which the appeal referred to was to be heard. The chief justice subsequently assigned Mr. Justice Irving, Mr. Justice Morrison and Mr. Justice Clement to be the Court to sit on the above appeal, and directed the registrar to notify all the judges and the counsel concerned of this arrangement. In all this the chief justice seemed to be within his rights.

It appears that Mr. Justice Martin did not take the sittings at Nelson and Rossland, but insisted upon what he claimed to be his right to sit on the above appeal on the footing of the cancelled assignment, which he contended could not be changed; and when the case came on for hearing he took his seat on the Bench along with the other three judges.

It is difficult to understand upon what principle such a claim could be maintained, but even if technically maintainable it was most undesirable that such a matter should have been brought up for discussion in open Court, and so provoke an unseemly wrangle, the blame for which, must, we fear, rest upon the shoulders of Mr. Justice Martin.

The three judges assigned to hear the appeal decided that they were the Court, and that Mr. Justice Martin, who was also present, had no right to sit. During the discussion the later is reported to have said: "This matter should not be decided by this Court. It is not an independent tribunal—its members are so dominated by the extraordinary powers granted to the chief justice. I regret to have to say these things. I intend to go on sitting here as an enduring protest against these proceedings."

Mr. Justice Irving naturally took exception to the slur cast upon the Court, saying as is reported: "I regret that the Attorney-General is not here to hear the language which has been used on this Bench."

The report continues by giving the remarks of Sir Hibbert Tupper as follows: "Speaking for the Bar, I may say that no such idea has entered the head of any member of the Bar, and if such remarks had been made by any barrister the Law Society would take the matter up and his gown would be stripped from his back." The provocation must have been great when a man of the fairness, ability and experience of Sir Hibbert Tupper thought proper to use such forcible language. The Court rose shortly afterwards and upon its re-assembling Mr. Justice Martin retired.

We do not care further to pursue this unpleasant subject, nor to comment upon the language above quoted, nor to discuss the alleged strained relations referred to; but it cannot be tolerated that this sort of thing should continue. No one should be allowed to say anything or do anything which might tend to lower the dignity of the Bench, or to bring it into contempt in the eyes of the public and thereby tend to impair its efficiency. But what is required in this regard of every citizen is required vastly more of those who sit on the Bench, including in this case Mr. Justice Martin. It is unnecessary to enlarge upon such a self-evident proposition. The profession will insist that such things as these should cease to be.

PERMISSIVE WASTE BY TENANTS FOR LIFE OR YEARS.

If a lawyer in Ontario were asked to advise whether a tenant for life, or a tenant for years is liable, in the absence of any contract, or limitation to the contrary, for permissive waste, he would, perhaps, feel in somewhat of a quandary. From the case of *Patterson v. Central Canada L. & S. Co.*, 29 Ont. 134, he might possibly conclude that neither a tenant for life nor years is liable for permissive waste, but if he adopt the views expressed by Meredith, C.J.C.P. in *Morris v. Cairncross*, 14 O.L.R. 544, then he must conclude that both tenants for life

and tenants for years, are so liable. There is, however, a difficulty about the case of *Morris v. Cairncross*, owing to the fact, that the result of the judgment was to affirm the judgment of the learned Chancellor then in appeal, but on different grounds, and it may therefore hereafter be found that *Morris v. Cairncross* is not an authority binding on any other Divisional Court except for the point actually determined.

The question at issue in *Morris v. Cairncross* was whether a lease made by a tenant for life, extending beyond his own life, was binding on the remainderman under the Settled Estates Act (R.S.O., c. 71). The validity of the lease depended on whether or not it had been made "without impeachment of waste." The lease in question was in the usual statutory form, but it exempted the tenant from liability to repair or rebuild in case of reasonable wear and tear or damage by fire or tempest. The learned Chancellor held that this exemption went beyond the statutory form as regards damage by tempest, and had, as to such damage, the effect of exonerating the tenant from liability for waste occasioned by tempest, though due to negligence on his part; but he held that such damage would be merely permissive waste for which the tenant for years was not legally liable, relying to some extent on his previous decision as to tenants for life, in *Patterson v. Central Canada L. & S. Co.* supra, but, on appeal from this judgment, this curious result was arrived at, viz., that the Divisional Court held that the result was right, but the reasons were wrong, and tenants for years are, in the absence of any contract to the contrary, liable for permissive waste, but that the lease in question did not exonerate the tenant from such liability, because neither wear and tear, nor damages by fire or tempest not due to the tenant's own negligence are within the category of permissive waste at all, notwithstanding the decision of Kekewich, J., in *Davies v. Davies*, 34 Ch.D. 499, to the contrary, and it was further held that the exception did not have the effect of relieving the tenant from liability for waste if the damage by tempest was attributable to negligence on his part. The lease was therefore held

valid and the decision of the Chancellor was affirmed, but upon grounds entirely different from those on which the original decision was based.

The law on this point may, therefore, appear to be in Ontario in the same illogical condition in which it also appears to be in England, viz., that tenants for life are not liable for permissive waste, but tenants for years are: see Fawcett's *Landlord and Tenant* (1905), p. 352; that is, so far as judicial decisions are concerned.

But it is submitted that since the consolidation and revision of the Imperial Statutes in R.S.O. (1897) vol. 3, the liability of lessees for life, and years, for voluntary or permissive waste in Ontario is reasonably plain, and the only doubt there can be is in regard to that class of tenants for life (other than tenants by curtesy, and dowresses,) who are not in the position of lessees.

In order to arrive at a proper conclusion as to their liability, it is necessary to bear in mind that waste is an active or passive injury to a tenement by a person rightfully in possession, wherein it differs from trespass, which is a tortious act done by a stranger. Secondly, that according to ancient writers, the only persons who were liable for waste at common law were tenants by curtesy, tenants in dower, and guardians in chivalry; and the reason for this, as stated by Coke, and generally accepted, was because tenants of this kind held by virtue of estates created by law, and the law, for the protection of the remainderman and infant heir, annexed the obligation that such tenants should not be guilty of waste; whereas in the case of tenants for life or years, their estates were created by the owner of the fee who might have provided against the commission of waste by the tenant: Co. Lit. 54a, 300; Co. Inst. 145.

Some doubt was cast on this by Reeves, in his *History of English Law*, upon the presumed authority of Bracton: 1 Reeves' His. 386, who thought that all tenants for life were liable at common law for waste; but Chief Baron Comyn, whose opinion alone was said by Lord Kenyon to be an authority, declares in his *Digest* that "By the common law, waste did not lie against

lessee for life or years, for it was laches in the lessor that he did not provide against waste:" Com. Dig., tit. Waste A. 2; and see Cruise's Dig. vol. 1, p. 119, s. 25. It has been remarked by a learned judge in the Connecticut Supreme Court that "If it be said that the persons whose works are cited, found themselves on the doctrine and reasons of Sir Edward Coke, it will not be denied. It only proves that the authority of Bracton cannot stand in competition with the transcendent authority of the great law luminary in the opinion of celebrated jurists, perfectly capable of appreciating their respective merits," per Hosmer, C.J., 3 Conn. p. 488, and see Doc. & Stud. pp. 102-3 (Muchall's ed.).

If Lord Coke is right, then it follows that the liability for waste, except in the cases provided for by the common law, is the result of statute law, and the liability only extends to those tenants to whom the statute, in terms or by necessary implication, applies.

The only statutes which impose liability on tenants for life or lessees for years are the Statutes of Marlbridge and Gloucester.

The Statute of Gloucester (6 Edw. I, c. 5) as now revised and consolidated in Ontario R.S.O. (1897) c. 330, s. 21, reads as follows: "A tenant by the curtesy, a dowress, a tenant for life, or for years, and the guardian of the estate of an infant, shall be impeachable for waste, and liable in damages to the person injured." And here we may note that as regards tenants by curtesy and tenants in dower, the statute is merely declaratory of the common law, but as regards other tenants for life, and tenants for years, it imposes a liability, which as we have seen did not exist at common law, if we accept Sir Edward Coke and Littleton as authorities.

The Statute of Marlbridge (52 Henry III. c. 23), which is now revised and consolidated in Ontario as R.S.O. 1897, c. 330, s. 23, reads as follows: "Lessees making or suffering waste on the demised premises without license of the lessors shall be liable for the full damage so occasioned." This it may be ob-

served, was the earlier statute in point of time, and this difference between the two sections is to be noted, viz., that while the Statute of Marlbridge is confined to lessees for life or years, the Statute of Gloucester includes all tenants for life, whether holding under lease or otherwise; and while the Statute of Gloucester as revised (as in the original) merely speaks of "waste," the Statute of Marlbridge, as revised, expressly includes those "suffering" waste, which is but another mode of saying "permitting waste." But it is also to be noticed that neither statute includes within its provisions tenants at will, or at sufferance, neither do the words used expressly include tenants for a year, or less than a year, or tenants from year to year.

Littleton, however, says (s. 67): "Also, if tenements be let to a man for a term of half a year, or for a quarter of a year, etc., in this case if the lessee commits waste the lessor shall have a writ of waste against him, and the writ shall say *quod tenet ad terminum annorum*; but he shall have a special declaration upon the truth of the matter, and the Court shall not abate the writ, because he cannot have any other writ upon the matter." This, as appears by Coke's comment, was due to the fact that the form of the writ of waste had been settled under the authority of an Act of Parliament, and could not be changed without the like authority, and Coke on this section at Co. Lit. 54(b), says: "In this particular case the Statute of Gloucester c. 5, which giveth the action of waste against the lessee for life or years (which lay not against them at the common law) speaketh of one that holdeth for term of years in the plural number; and yet here it appeareth by the authority of Littleton, that although it be a penal law whereby treble damages, and the place wasted, shall be recovered, yet a tenant for half a year, being within the same mischief, shall be within the same remedy though it be out of the letter of the law, for *qui hæret in litera hæret in cortice*." We may venture to doubt whether this is perfectly sound reasoning and whether all the authorities noted in the margin bear out this comment, the citation from Bract. Lib. 4, pp. 315-317, does not, neither

does Britton, pp. 162, 168; nor 37 H.6. 26: and it would seem improbable that Bracton or Britton, who is supposed to have died in 1268, could furnish any light on the construction of statutes passed in 1267 and 1278. But 7 H.7. 2 and 14 H.8. 12, support Coke's comment, and so does Fitzherbert Nat. Brev. 60, although he adds, a quære, see Littleton 14," but whether this is p. 14 or s. 14 is not clear, but s. 14 of Littleton does not appear to throw any light on the subject. Doctor and Student (Muchall's ed.) 107, 113, also supports the text.

But Littleton in effect lays it down that tenants at will were not within the Statute of Marlbridge. In s. 71 he says: "Also, if a house be leased at will the lessee is not bound to sustain or repair the house as tenant for term of years is tyed. But if tenant at will commit voluntary waste as in pulling down of houses or felling of trees, it is said that the lessor shall have an action of trespass for this against the lessee," and this, as Coke in his comment says, because the act amounted to a determination of the will. With this statement of the law agree *The Countess of Salop v. Crompton*, Cr. Eliz. 777, 784; *Panton v. Isham*, 3 Lev. 359, and *Gibson v. Wells*, 1 B. & P. 290.

In *The Countess of Salop v. Crompton*, a tenant at will was sued for having negligently permitted the demised premises to be burnt, and also for damages thereby occasioned to other premises of the plaintiff. The plaintiff recovered a verdict of £15 for damages to the demised premises and £80 for the damage to the other premises. "But all the Court held in this case that for the negligent burning, this nor any action lies; for he comes in by the act of the party, and it was folly that he did not provide for it." But Popham and Fenner, JJ. agreed that trespass would lie against a tenant at will for wilful destruction of the demised property to which, on the case being again mentioned (see p. 784), Gawdy and Clench, JJ., also agreed "because the privity of the lease is determined by this act done which his estate permits not," and it was said a lessee at will does not take "any charge upon him, but to occupy and pay his rent;" and it was also said, "none will affirm if a lessee at will

suffers his house to fall down, that an action should lie against him, for he is not bound to repair it."

It may therefore be considered to have been early and well settled that the expression of "lessees for years" does not include lessees at will. Tenants at sufferance are also not included because they are in by wrong. Both tenants at will, and tenants at sufferance are, however, liable in trespass for any injuries they may do to the premises whilst in their occupation.

But as regards lessees who are within the statute Lord Coke appears to have had no doubt that the words of both the Statutes of Marlbridge and Gloucester included both active and permissive waste. Speaking of the Statute of Marlbridge he says: "To do or make waste, in legal understanding in this place includes as well permissive waste, which is waste by reason of omission or not doing, as for want of reparation, as waste by reason of commission, as to cut down timber trees, or prostrate houses, or the like: and the same word hath the Statute of Gloucester, c. 5, *que aver fait waste*, and yet is understood as well of passive as active waste." 2 Inst. 145, and see per Serjt. Salkeld arguing in *Hammond v. Webb*, 10 Mod. 282.

There are two old cases in Moore's King's Bench Reports which shew that the judges of the time of Elizabeth understood the statutes to cover permissive waste. In an anonymous case, Trin. T. 6, Eliz. at p. 62, we find the waste assigned was in respect of a marsh for that the lessee suffered a wall of the sea adjoining the marsh to be ruinous, by reason of which, by the flow and reflow of the sea the land was surrounded." Carus, J., said: "This assignment of waste is not good ('n'est bone') for the overflowing of the sea does not constitute waste, for the sea cannot be confined within any limit; it is like assigning waste in a house which was destroyed by tempest. Harper (whether a judge or counsel is not clear) suggests if the wind divide the thatch of the house in a small part (pcel) the lessee is held bound to restore it, which Dyer, C.J., conceded; and if he suffer that to continue and does not repair it, then at last

when the house is destroyed by tempest, that is waste. Dyer, C.J., further says, "It seems reasonable that if a little breach was in the bank or wall and the lessee does not repair it but suffers it to continue, then, after the violence of the sea breaks all the wall and surrounds the land, that that is waste; for that might be amended by the lessee at the commencement; but if it were suddenly done by violence of the water, then that might be pleaded in bar of the action. But he said it was a rare case, and asked the clerks if they had any precedents for such assignment, and they said they had not."

In Griffith's case in the same Term reported on p. 69, the waste assigned was that the lessee suffered the banks of the River Trent to be unrepaired whereby the water broke the banks and surrounded the land, and it was held by all the justices that that was waste, because the lessee might have kept the river within its banks, and it was unlike the sea which cannot be restrained.

The early cases collected in vol. 30 of the Am. & Eng. Enc. of Law (p. 260, note 2), shew very clearly that down to the time of the publication of Blackstone's commentaries, and for some time after, that there was no question at law that the word 'waste' in the Statutes of Marlbridge and Gloucester included permissive waste.

A dowress was liable for permissive waste, see 18 Edw. III. cas. 72, but we must remember that dowresses were liable for waste at common law, and therefore this case may not be strictly referable to the statute: see however, Doct. & Stud. 113, post.

It was not until after the publication of Blackstone's Commentaries that the Courts seem first to have begun to make inroads on the previously accepted construction of the Statutes of Gloucester and Marlbridge. Although, as we have seen, the earlier authorities clearly laid it down, that all lessees (other than tenants at will) were within the Statute of Marlbridge, and though they were equally unanimous that the waste referred to in that statute included both active and permissive waste, yet the Courts of law without denying that all lessees other than

tenants at will are within the statute, nevertheless decided that while some lessees are liable for permissive waste causing consequential damage, others are not, thereby apparently leading to the inference that though the statute makes no distinction between lessees who are within its scope, it must be construed as if it did; which does not seem to be a very satisfactory conclusion.

Thus, although the earlier authorities, as we have shewn, had held that tenants from year to year were within the Statute of Marlbridge, yet later nisi prius decisions have been given which, it has been assumed, establish that though liable for active, they are not liable for permissive waste: *Anworth v. Johnson*, 5 C. & P. 241; *Toriano v. Young*, 6 C. & P. 12; *Leach v. Thomas*, 7 C. & P. 327; *Horsefall v. Mather*, Holt 7. If that is really the effect of these decisions, they seem to be a clear judicial departure from the ancient interpretation of the statute: see Co. Lit. 52(b), *et seq.*, and 54(b); and inasmuch as it is only by virtue of the statute that such tenants are liable for active waste, and the statute, it is conceded, applies to both active and permissive waste, it becomes hard to reconcile these judicial departures with sound reason. In *Anworth v. Johnson*, Lord Tenterden, C.J., said that a tenant from year to year is only bound to keep the house wind and water tight, and in *Leach v. Thomas*, a similar rule was laid down by Patteson, J. It appeared by Lord Tenterden's charge, however, that the greater part of what was claimed by the plaintiff in *Anworth v. Johnson* consisted of new materials where the old were actually worn out. So that that case cannot be considered very conclusive, because ordinary wear and tear is not waste at all; furthermore, a neglect to keep the demised premises wind and water tight, would, if damage resulted, be permissive waste for which, according to the dicta of Tenterden, C.J. and Patteson, J., the tenant would be liable. It may, therefore, be doubted whether either case has the effect attributed to it. *Toriano v. Young* is still less conclusive, for though the defendant was treated by the Court as though he were a tenant from year to year, he was in reality

a tenant overholding under a lease which expired in 1829, and the plaintiff's claim was for damages for permissive waste since that date. It is therefore clear that the defendant was really a tenant at sufferance and therefore not within the Statute of Marlbridge. This case therefore is no authority for the proposition that a tenant from year to year is not liable for permissive waste.

Another *nisi prius* decision of Gibbs, C.J., in *Horsefall v. Mather*, Holt N.P. 7, seems equally unsatisfactory and inconclusive. The action was in *assumpsit* and the declaration stated that in consideration that the defendant had become and was tenant to the plaintiff of a certain messuage he undertook to keep the same in good and tenantable repair; to uphold and support, and to deliver the same to the plaintiff at the expiration of his term in the condition in which he received it. The evidence was that the tenement was in good repair when the defendant entered, but upon quitting possession he had damaged the ceiling, walls and other parts of the house by removing shelves and fixtures, and had not left the house in good tenantable condition. The action, it will be observed, was not on the case for waste, but in *assumpsit* on an implied promise to keep in repair, and the chief justice said: "I am of opinion that the plaintiff is not entitled to recover. He has laid his ground too broadly. The defendant is answerable to some extent but not to the extent stated in the declaration. Can it be contended that a tenant at will is answerable if premises are burned down—would he be bound to rebuild if they became ruinous by any other accident? And yet if bound to repair generally he might be called upon to this extent. He is bound to use the premises in a husband-like manner; the law implies this duty and no more. I am sure it has always been holden that a tenant from year to year is not liable to general repairs." This is the whole of the judgment as reported and all that it really decides is that in an action of *assumpsit* if the plaintiff asked too much, he could not get even what he was entitled to. The liability for permissive waste under the Statute of Marlbridge is not even referred

to. The observations about tenants at will had clearly nothing to do with the case. Then the reporter adds in a note, "Although an action on the case may be maintained against a tenant for commissive or wilful waste, no action can be maintained for permissive waste only: *Gibson v. Wells*, 1 N.R. 291," which is a statement altogether unjustified by the case of *Gibson v. Wells*, which only decided that such an action would not lie against a tenant at will. But this note is useful as helping to shew how the impression gained currency that an action for permissive waste would not lie against any tenants, whether for life or years (see also the Dig. of Eng. Cas. Law, vol. 14, p. 1847). But the argument that because tenants at will are not liable for permissive waste, therefore tenants for life and tenants for years are not liable, is obviously fallacious. These mistatements of the law were considered by Parke, B., who delivered the judgment of the Court of Exchequer in *Yellowly v. Gower*, 11 Ex. 274, and the ancient construction of the Statute of Marlbridge was approved. "We conceive that there is no doubt of the liability of tenants for terms of years, for they are clearly put on the same footing as tenants for life, both as to voluntary and permissive waste, by Lord Coke, 1 Inst. 53, *Harnet v. Maitland*, 16 M. & W. 257, though the degree of repairs required from a tenant from year to year by modern decisions is much limited: *Smith's Landlord and Tenant*, 195." This view was adopted by Kekewich, J., in *Davies v. Davies*, 38 Ch.D. 499.

Jones v. Hill, 1 Moore 100, is another case which has been cited as supporting the view that a tenant for years is not liable for permissive waste, but all that it actually decided is, that where there is an express covenant by a lessee to repair, there an action on the case for waste does not lie because "such a contract is a total waiver of tort." This, as the reporter notes, agrees with what is said in Hargrave and Butler's note 359, to Co. Lit. 54 (b), viz.: "But if lessee covenants to repair and doth not repair, waste will not lie, 29 E. 3, 43; 21 H. 6, 6; Dy. 198, *Hal Moss*." In *Martin v. Gilham*, 7 A. & E. 540, the plaintiff's declaration charged merely active waste against the defendant,

a tenant from year to year, and the evidence only established a case of permissive waste, and Lord Denman, C.J., said: "It would be confounding things which are different, to say that a charge of voluntary waste is a charge of permissive waste." The plaintiff therefore failed to recover, not because the defendant was not liable for permissive waste, but because the evidence failed to support the waste charged. Properly considered therefore, none of these cases can really be accounted as effectively overruling the ancient interpretation put upon the Statutes of Marlbridge and Gloucester.

There is a passage in *Doctor and Student* (Muchall's ed.), p. 113, which may here be noted as confirmatory of the ancient view, where it is said: "It hath been used as an ancient maxim of the law, that tenant by the curtesy and tenant in dower should take the land with this charge, that is to say, that they should do no waste themselves, nor suffer none to be done, and when an action of waste was given after against a tenant for term of life, then he was taken to be in the same case, as to the point of waste, as tenant by the curtesy and tenant in dower was, that is to say that he shall do no waste, nor suffer none to be done; for there is another maxim in the law of England, that all cases like unto other cases shall be judged after the same law as other cases be, and sith no reason of diversity can be assigned why the tenant for life after an action of waste was given against him, should have any more favour in the law than the tenant by the curtesy, or tenant in dower should, therefore, he is put under the same maxim as they be, that is to say, that he shall do no waste, nor suffer none to be done." *Doctor and Student*, it may be remarked, was first published in 1518.

The question of the liability of tenants for life and years for permissive waste seems to have been further confused by the erroneous supposition that Courts of Equity had held that they were not liable for permissive waste, a misconception which plainly arises from a misunderstanding of the attitude of Courts of Equity on the subject. The jurisdiction of Courts of Equity in regard to waste was a concurrent jurisdiction with

that of Courts of law. The remedy afforded in equity was found to be more speedy and efficacious than by action at law, and therefore suits to restrain commissive waste practically superseded actions for waste at law in which only damages were recoverable. But the foundation of the interference by Courts of Equity was the prevention of irreparable damage, and the inadequacy of the remedy at law. Where active waste was committed or threatened the Court of Chancery would by injunction restrain it, and, as an incident to the relief by injunction, would also grant an account of the waste committed, but whether the Court would grant an account of waste committed and decree satisfaction where an injunction was not required or grantable, was a point on which there was formerly a difference of opinion: see *Eden on Injunction*, p. 207. In *Jesus College v. Bloom*, 3 Atk. 264, Lord Hardwicke refused to grant an account for waste because no injunction was prayed (see also *Higginbotham v. Hawkins*, L.R. 7 Ch. 676), whereas in *Garth v. Colton*, 3 Atk. 751, he granted the relief.

It may be further remarked that in order to give equitable relief in cases of permissive waste by injunction, would involve the granting of a mandatory injunction. It would not be a case for restraining a defendant from doing something, but it would be necessary to restrain him from suffering something to remain undone, e.g., the making of required repairs. Permissive waste may, in many cases, be the result of poverty or inability on the part of the tenant to furnish money to make repairs, and it never has been the course of the Court to enforce what in substance are mere pecuniary demands by injunction, except against persons in a fiduciary position. It must be remembered, too, that the disobedience of injunctions is a contempt of Court, and punishable by attachment, and to grant injunctions to enforce pecuniary demands would be practically an evasion of the law abolishing imprisonment for debt. Permissive waste has therefore never in equity been considered a proper subject for relief by injunction, although in the case of *Coldwall v. Baylis*, 2 Mer. 408, an

injunction against the commission of active waste appears to have been so worded as to cover also future permissive waste. Whether advisedly or per incuriam it is hard to say, quite possibly the latter. The ordinary purpose for which mandatory injunctions are granted is to compel a party to undo some wrongful act which he has done, not to perform some act which he has omitted to do.

From an early date, therefore, injunctions to restrain merely permissive waste have been refused, not because the plaintiff had not a legal right, but because equity did not consider it was such a right as could be enforced by injunction. *Lord Castlemain v. Craven*, 22 Vin. Ab. tit. Waste, p. 523; *Coffin v. Coffin* (1821), Jac. 70; *Lansdowne v. Lansdowne*, 1 Jac. & W. 522; *Powys v. Blagrove*, 4 D. M. & G. 448. Other cases might be mentioned where the Court of Chancery has refused to enforce legal demands by injunction. There is a well-known case of *Lumley v. Wagner*, 1 D. M. & G. 604, where the Court restrained a singer who had contracted to sing for the plaintiff from singing elsewhere, or for anybody else, although a mandatory injunction commanding her to sing for the plaintiff would not be granted: see also *Montague v. Flockton*, L.R. 16 Eq. 189. But it would be a mistake to suppose that this was because the defendant was not liable at law for breach of her contract to sing for the plaintiff.

So it is equally a mistake to suppose, that because a Court of Equity would not grant a mandatory injunction in the case of permissive waste by a tenant for life or years, it was because such tenants were not legally liable for permissive waste. The true ground being that permissive waste, in the estimation of Courts of Equity, could be sufficiently compensated by damages in an action at law: see per Hardwicke, L.C., in *Jesus College v. Bloom*, 3 Atk. 262; and while equity would restrain the commission of active waste, it would not interfere where the defendant was merely doing nothing, and from the nature of such cases, it is easy to see that an interim mandatory injunction could not be safely granted. But in reading cases and text

writers we find that this refusal to grant relief in equity against permissive waste, has come to be treated by some judges and writers as though Courts of Equity had decided that tenants for life and tenants for years are not liable for permissive waste. That some common law judges have taken this view of equity is apparent from the case of *Barnes v. Dowling*, 44 L.T. N.S. 809, where Lopes, J., who delivered the judgment of the Court said: "The legal liability of a tenant for life for waste may be doubtful, but authority is strong to shew there is no liability for permissive waste in equity." This statement is perfectly true, but the inference which the learned judge seems to draw from it, viz., that Courts of Equity held that tenants for life are not legally liable for permissive waste; it is submitted, for the reasons above given, is quite erroneous.

But if common law lawyers have failed to appreciate equity decisions and practice respecting permissive waste, some equity lawyers seem to have equally failed to grasp the true effect of the decisions at law on the subject. In *Powys v. Blgrave*, 4 D. M. & G. 448, we find a Lord Chancellor, referring to the liability of a tenant for life for permissive waste, saying: "But then it is argued, independently of the trust, that it is the duty of a tenant for life to repair, *equitas sequitur legem*. But even legal liability now is very doubtful, *Gibson v. Wells*; *Herne v. Benbow*," neither of which cases it may be observed cast any doubt whatever on the legal liability of tenants for life for permissive waste. *Gibson v. Wells* has been already referred to and as we have shewn was the case of a tenant at will, and therefore had no bearing on the case of a tenant for life; and the facts of *Herne v. Benbow*, 4 Taunt. 764, were as follows: The plaintiff sued a defendant, a tenant under a lease containing no covenant for repair, in tort, for permissive waste, the defendant suffered judgment by default and on an assessment of damages before the under sheriff, the jury were directed to allow such sum as would put the premises in tenantable repair. The jury rejected that rule and gave small damages. An application was then made on behalf of the plaintiff for a new assessment of damages which was refused. The judgment

containing these words: "If this action could be maintained a lessor might declare in case for not occupying in a husband-like manner which cannot be. The facts alleged are permissive waste, and an action on the case does not lie against a tenant for permissive waste: *Countess of Shrewsbury's Case*, 5 Co. 13." The case cited is the same case as *Countess of Salop v. Crompton*, above referred to, which, as we have seen, was the case of a tenant at will, and had therefore no application to the case in hand, unless it was also a case of a tenancy at will, which does not appear, and while the statement may be true that an action would not lie for not occupying in a husband-like manner, if it only resulted in injury to the tenant himself, still it would seem to be actionable if it resulted in injury to the inheritance, in the same manner as active waste of a like nature: See per Gibb, C.J., in *Horsefall v. Mather*, supra, Co. Lit. 536; *Simmons v. Norton*, 5 M. & P. 645, 7 Bing. 640; *Wetherell v. Howells*, 1 Camp. 227; or converting land to other uses as, e.g., into a cemetery: *Cregan v. Cullen*, 16 Ir. Ch. 339; *Hunt v. Browne*, Sau. & Sc. 178.

In the case of *Woodhouse v. Walker* (1880), 5 Q.B.D. 404, 42 L.T. 770, an action against a deceased tenant for life's personal representative for permissive waste suffered by the tenant for life in her lifetime, was held to be maintainable. In that case the land had been devised by a testator to his wife "during her life, she keeping the same in repair." It is submitted that the words "she keeping the same in repair," was merely a statement of the duty which the statute imposed on her. Her estate could only be liable on the supposition that she herself if living would be also liable. Formerly the right of action in respect of waste whether active or permissive would subject to the exception in case of active waste hereafter mentioned have died with the tenant for life, but now under R.S.O. c. 129, s. 11 (see Impl. St. 3 & 4 W. 4, c. 42, s. 2), such actions may be brought against the representatives of a deceased wrongdoer (see notes to *Greene v. Cole*, 2 Saunders 251), but even before the statute last referred to, where the wrongdoer's estate had benefited by the waste, his estate might have been made liable

therefor at law, after his death; see *Hambly v. Trott*, 1 Cowp. 371.

The case of *Woodhouse v. Walker* was followed in *Re Williams, Andrew v. Williams* (1884) 52 L.T. 40, affirmed by the Court of Appeal, (Brett, M.R. and Bagallay and Fry, L.JJ.), 54 L.T. 105, and though the Court held that the liability for permissive waste arose by reason that a duty to repair was imposed by the instrument creating the life estate, yet surely, as has been already said, that stipulation creates no higher or greater duty than the Statute of Gloucester imposes: see also *Re Skingley*, 3 Mc. N. & G. 221; *Gregg v. Cootes*, 23 Beav. 33.

But assuming that the imposition of a condition by the instrument creating the estate that a tenant for life is to repair does impose a greater liability than the Statute of Gloucester, then at all events as to such tenants for life according to the above cases there is a liability for permissive waste. But it is submitted that altogether apart from such conditions, the liability of tenants for life under the Statutes of Marlbridge and Gloucester is perfectly plain according to the ancient interpretation of those statutes, and that without any such conditions or provisos there is a liability on tenants for life both for active and permissive waste.

In view of what has been already said it is somewhat difficult to understand the language of Kay, J., in *Re Cartwright*, 41 Ch.D. 532. "At the present day it would certainly require either an Act of Parliament, or a very deliberate decision of a Court of very great authority, to establish the law that a tenant for life is liable to a remainderman in case he should have permitted the buildings on the land to fall into a state of dilapidation." The Statute of Gloucester as interpreted for 500 years, seems a pretty good foundation for the doctrine which he impugns and what is really needed to support the decision, *In re Cartwright* is an act repealing the Statutes of Gloucester and Marlbridge. *Re Cartwright*, moreover, seems inconsistent with another decision of Kay, J., himself, *In re Bradbrooke*, 56 L.T. 106. *In re Cartwright* was followed by North, J., *In re Parry* (1900) 1 Ch. 160; and by Boyd, C., in *Patterson v. Cen-*

tral Canada L. & S. Co. (1898), 29 Ont. 134, and by Teetzel, J., in *Monro v. Toronto Ry. Co.* (1904), 9 O.L.R. at p. 305, but as Teetzel, J., concurred in the judgment of *Morris v. Cairncross*, it may be taken that he, at all events, is now of the opinion that his previous opinion in *Monro v. Toronto Ry.* was erroneous.

Although it be, as we have endeavoured to shew, that all tenants for life and years in the absence of any contract or stipulation to the contrary, are liable for permissive waste, there is a distinction drawn in the cases as to the extent of that liability. It would appear from the judgment of the Court of Appeal (Cotton, Bowen and Fry, L.JJ.), *In re Courtier, Cole v. Courtier* (1886), 34 Ch.D. 136; 55 L.T. 547, that a tenant for life is not required to keep the premises in any better condition than they are in when he enters, and see Co. Lit. 53a (sed vide *Re Bradbook*, 56 L.T. 106); and in the case of tenants from year to year, or for a year, or half a year, the measure of repair required of them may be less than in the case of a tenant for years or for life. The statute, however, as we have said, makes no such distinction. Formerly, as we have seen, equity would ordinarily not decree merely an account in cases of waste, except in special circumstances, as in *Garth v. Cotton*, supra, and would give no relief at all in cases of permissive waste. The High Court being armed with all the powers of the former Courts of law and equity may, if it sees fit, direct the damages in an action for permissive waste to be ascertained by a master, as well as by a jury, but no doubt the same reasons which induced the Court of Chancery to refuse to interfere by mandatory injunction in cases of permissive waste, will still prevail in the High Court; see *Lawson v. Crawford*, ante p. 40. The Judicature Act has also had the effect of converting that inequitable form of waste which was formerly known by the strangely incongruous title of "equitable waste," into what is known by the equally incongruous term of "legal waste:" see s. 58(2).

To return to the inquiry with which we started, viz., whether a tenant for life, or years is liable in the absence of any contract or limitation to the contrary, for permissive waste, we

should say with all due respect to the adverse opinions to which we have referred, that the answer ought to be in the affirmative, and that the case of *Morris v. Cairncross* ought to be taken to have settled the point as far as the Province of Ontario is concerned.

GEO. S. HOLMESTED.

JUDGE OF EXCHEQUER COURT.

The Dominion Government has seldom made an appointment to the Bench that will meet with more general approval than that of Mr. Walter G. P. Cassels, K.C., to the Exchequer Court. That the position should have been filled without delay was imperative, in view of the amount of work demanding attention. Mr. Cassels is known throughout Canada as one of the leaders of the Ontario Bar, with a wide and varied knowledge, and a courteous address. He will be in all respects a fitting successor to the late Judge Burbidge. The new judge is recognized as one of the best patent lawyers in Canada, and for some years past has been in nearly every patent case before the Exchequer Court; and questions affecting patents have become particularly numerous in that Court during recent years. Consequently Judge Cassels's knowledge will be specially applicable. We congratulate the new judge on his appointment to that very important federal Court.

Various names have been spoken of as desirable to fill the vacancy in the Railway Board caused by the death of Mr. Killam:—Chief Justice Mulock (who, however, has stated that he would not undertake it); Mr. Justice Mabee, and Mr. E. F. B. Johnston, K.C. Either of these would be excellent appointments; and we do not know of any who possess to as great a degree as either of these the qualifications necessary for this most important position. The name of Mr. F. H. Chrysler has also been suggested as one who would make a most useful member of the Board, and with this we entirely agree.

REVIEW OF CURRENT ENGLISH CASES.

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BANKRUPTCY—COSTS ORDERED TO BE PAID BY CREDITOR TO TRUSTEE—SET-OFF OF COSTS AGAINST DIVIDEND—ASSIGNEE OF CREDITOR.

In re Mayne (1907) 2 K.B. 899, although a case in bankruptcy, deserves a passing notice. A creditor of the bankrupt lodged a proof against the estate which was contested, and in the result the creditor was ordered to pay the costs of the contestation to the trustee in bankruptcy. The creditor then assigned her claim to her solicitors who lodged a new proof which was allowed. The costs not having been paid, the trustee claimed the right to deduct them from any dividend payable in respect of the claim; this was resisted by the assignees but Bigham, J., gave effect to the trustee's contention.

PRACTICE—EXECUTION—MONEY BELONGING TO DEBTOR—DEATH OF DEBTOR BEFORE SEIZURE OF HIS MONEY BY SHERIFF—(R.S.O. c. 77, s. 18.)

In *Johnson v. Pickering* (1908) 1 K.B. 1 the Court of Appeal (Moulton, Farwell and Buckley, L.JJ.) have been unable to agree with the decision of Lawrance, J., (1907) 2 K.B. 437 (noted ante, vol. 43, p. 693). It may be remembered that the question in dispute was whether certain money which had been brought into an execution debtor's house, after a seizure under *fi. fa.* had been made of his household effects, and while the sheriff was in possession, could be said to be bound by the writ. The sheriff was ignorant of the existence of the money. The debtor having died and an order having been made for the administration of his estate in bankruptcy, the trustee in bankruptcy claimed the money which had been discovered after the debtor's death by his widow. Lawrance, J., thought the money was bound by the execution, but Moulton, L.J., was of the opinion that the statute authorizing the seizure of money does not have the effect of making the *fi. fa.* binding on money liable to execution, either as at common law from the date of the writ, or as under the Sale of Goods Act 1893, s. 26, from the delivery of the writ to the sheriff (R.S.O. c. 338, s. 11), but merely from

the actual seizure of the money by the sheriff and here there having been no actual seizure in the debtor's lifetime, it was not bound by the writ after his death as against the trustee in bankruptcy who was entitled to the money as he claimed—Buckley, L.J., though agreeing, does so with hesitation—and we should say with good reason. How far the decision is applicable in Ontario seems doubtful.

CHEQUE—FORGED INDORSEMENT—PAYEE—FICTITIOUS PAYEE—BELIEF OF DRAWER—BILLS OF EXCHANGE ACT, 1882 (45-46 VICT. c. 61) s. 7, SUB-S. 3—(R.S.C. c. 119, s. 21(5).)

In *Macbeth v. North and South Wales Bank* (1908) 1 K.B. 13 the Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L.JJ.) have affirmed the judgment of Bray, J., (1906) 2 K.B. 718 (noted ante, vol. 43, p. 13). The facts of the case were briefly as follows. One White falsely represented to the plaintiff that he had agreed to purchase from one Kerr certain shares, and had arranged to resell the shares at a profit, and induced the plaintiff to give him a cheque on the Clydesdale Bank in favour of Kerr for the purchase money for the shares. White, instead of handing the cheque to Kerr, forged his name to the indorsement of the cheque which he then deposited in the defendant bank, which collected the amount from the Clydesdale Bank. It turned out that White had made no agreement to purchase the shares from Kerr and that Kerr as a matter of fact owned no such shares. The Court of Appeal agreed with Bray, J., that Kerr could not be said to be a "fictitious person," within s. 7, sub-s. 3, of the Bills of Exchange Act 1882 (R.S.C. c. 119, s. 21(5)), and therefore that the defendant bank was liable to the plaintiff for the amount of the cheque which they had received upon the forged indorsement.

EASEMENT—LIGHT—LESSEE ENTITLED TO EASEMENT—REVERSION OF DOMINANT TENEMENT CONVEYED TO OWNER OF SERVIENT TENEMENT—UNITY OF SEISIN—EXTINGUISHMENT OF EASEMENT—PRESCRIPTION ACT, 1832 (2-3 WM. IV. c. 71), s. 3—(R.S.O. c. 133, s. 36.)

In *Richardson v. Graham* (1908) 1 K.B. 39 the Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L.JJ.), following the recent decision of the House of Lords in *Morgan v. Fear* (1907) A.C. 425 (noted ante, p. 29) held, that

where the lessee of premises has, under the Prescription Act 1832 (2-3 Wm. IV. c. 71) s. 3—(R.S.O. c. 133, s. 36), acquired an easement of light, his lessor cannot, by conveying the reversion to the owner of the fee of the servient tenement, defeat or extinguish the easement so far as the lessee is concerned.

LANDLORD AND TENANT—TRADE FIXTURE—HIRE PURCHASE AGREEMENT—CHATTEL AFFIXED TO FREEHOLD—GAS ENGINE—DISTRESS.

Crossley v. Lee (1908) 1 K.B. 86 was an appeal from a County Court, and the question for decision was whether a gas engine which had been procured under a hire purchase agreement by a tenant of certain premises, and secured to the floor of the premises by bolts and screws was distrainable for rent. The Divisional Court (Phillimore and Walton, JJ.) held that the engine had been affixed to the freehold, and therefore was not liable to distress, although the tenant might have a right to remove it as a trade fixture, and that the plaintiff was entitled to recover damages for its removal. It is a remarkable circumstance about this case, that the plaintiff was not the tenant, but the person from whom the tenant had got the engine, and who claimed that the engine was his property. It looks, however, as if it was a case of *damnum absque injuria*, because if the engine were affixed to the freehold as the Court holds it was, then it had ceased to be the plaintiff's property, and therefore even if the distress were wrongful as against the tenant, the plaintiff had no right to complain. In connection with this case it may be well to refer to the recent decision of the Court of Appeal in *Ellis v. Glover*, 124 L.T. Jour. 238, where it was held that persons in the same position as the plaintiff in this case, were liable for removing the fixtures without the consent of a mortgagee of the premises.

LANDLORD AND TENANT—COVENANT RUNNING WITH THE LAND—COVENANT BY SUB-LESSOR TO PERFORM COVENANTS OF HEAD LEASE OR INDEMNIFY SUB-LESSEE—COVENANT FOR QUIET ENJOYMENT—32 HEN. VIII. c. 34, s. 2—(R.S.O. c. 330, s. 13.)

In *Dewar v. Goodman* (1908) 1 K.B. 94 the Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L.J.J.) have affirmed the judgment of Jelf, J., (1907) 1 K.B. 612 (noted ante, vol. 43, p. 399). The action was brought by an assignee

of an under-lessee for breach of covenant by the under-lessor to perform the covenants to repair contained in the head-lease which included other property besides that comprised in the under-lease. The defendant was the assignee of the under-lessor and was entitled to the premises mentioned in the head-lease for the unexpired term subject to the under-lease. The under-lessor having made default in performance of the covenant to repair in the head-lease, the superior landlord had entered and ejected the plaintiff. The Court of Appeal agreed with Jelf, J., that the action was not maintainable, because the covenant to perform the covenants in the head-lease related to premises not demised by the sub-lease, and not being a covenant to be performed on the demised premises, it was merely a collateral covenant which did not bind an assignee of the covenantor though named therein.

ADMINISTRATOR AD COLLIGENDA BONA—LEASE—ENTRY OF ADMINISTRATOR ON LEASEHOLDS—RENT—LIABILITY OF ADMINISTRATOR FOR RENT—USE AND OCCUPATION BY ADMINISTRATOR

Whitehead v. Palmer (1908) 1 K.B. 151 is a case which illustrates the necessity for caution on the part of an administrator in dealing with the leasehold estate of the deceased, if he wishes to protect himself from personal liability for rent. In this case the defendant was appointed administrator ad colligenda bona of a deceased person, but with power to sell the leasehold premises of the estate, the rent of which was £450 a year. On the 7th June he took possession of the premises and endeavoured to sell or sub-let them, but failed. On 24th June a quarter's rent became due. On 23rd August, the rent not having been paid, the lessor commenced an action for recovery of possession and for rent, and mesne profits. Summary judgment for possession was given, and on 18th October defendant went out of possession. The action proceeded to trial before Channell, J., on the claim for rent, and mesne profits, and he held that the defendant was personally liable for a proportionate part of the rent from the 7th June until 23rd August and thereafter until he gave up possession for mesne profits at the same rate as the rent reserved by the lease, which appeared to be the fair value of the premises and this, although all the defendant had realized from the premises was £26 5s. 0d. Channell, J., points out that although the rule used formerly to be that an administrator ad colligenda could only collect, and had

no power to sell, yet of late years the Probate Division considered it had greater powers than the old Ecclesiastical Court in this respect.

ASSAULT — SCHOOL MASTER — ASSISTANT TEACHER — CORPORAL
PUNISHMENT OF PUPIL — SCHOOL REGULATIONS — NEW TRIAL
— BIAS OF JURY — WEIGHT OF EVIDENCE.

In *Mansell v. Griffin* (1908) 1 K.B. 160 a Divisional Court (Phillimore and Walton, JJ.) deal somewhat elaborately with an appeal from the order of a judge of a County Court granting a new trial. The action was brought by the plaintiff, a pupil in a public school, against the defendant, an assistant teacher, to recover damages for an assault, the facts being that the defendant had struck the plaintiff with a flat ruler on the arm, for a breach of school discipline. The plaintiff's arm was covered at the time, and the defendant had no knowledge that the plaintiff was, as the fact was, suffering from cartilaginous tumours, and the blows fell on one of these tumours which produced a more serious effect than would have been caused in the case of a child in normal health. The rules of the school provided that corporal punishment of pupils was only to be inflicted by the head master, and all such punishments were to be by birch or cane; but there was no evidence that the parents of the plaintiff had any knowledge of this regulation. The jury found the punishment inflicted was moderate, and that the instrument used was improper according to the school regulations, but was not so hurtful as a birch or cane: that the defendant had exceeded her authority under the regulations, and that there was no damage. On these findings the judge of the County Court entered judgment for the defendant but on the application of the plaintiff granted a new trial on two grounds: (1) A suspicion of bias on the part of the jury, and (2) That the first finding was against the weight of evidence. The Divisional Court held that there was no evidence on which a new trial could be granted on the ground of bias, but on the question of the weight of evidence, which was a matter of discretion, they declined to overrule the County Court judge, but remitted the case to him for reconsideration on that point. On the merits of the case the Divisional Court was of the opinion that the rules as to punishment were domestic regulations, and not being known to the parents, did not affect the implied authority which they might be presumed to have delegated to the defendant to

inflict reasonable punishment; and that, assuming the first and second findings were correct, the jury would be justified in finding a verdict for the defendant.

MUNICIPAL AUTHORITY—PLANS—WRONGFUL REFUSAL OF MUNICIPAL AUTHORITY TO APPROVE OF PLANS—MANDAMUS.

Davis v. Bromley (1908) 1 K.B. 170. This was an action by a builder to recover damages against a municipal body for wrongfully refusing to approve of plans of buildings submitted to them by the plaintiff. The plaintiff contended that the plans in all respects were in accordance with the defendant's by-laws, but that the defendants in consequence of a feeling created by previous litigation between the plaintiff and defendants, had wrongfully refused to approve of the plans. The case was tried before Lawrance, J., who non-suited the plaintiff and his judgment was approved of by the Court of Appeal (Williams, L.J., and Barnes, P.P.D., and Bigham, J.) that Court holding that the plaintiff's remedy was by motion for a mandamus.

GIFT BY HUSBAND TO WIFE—FRAUD ON CREDITORS—SET-OFF BY WIFE OF DEBT DUE BY HUSBAND.

Lister v. Hooson (1908) 1 K.B. 174, though a case arising in bankruptcy, deserves attention. The bankrupt made a voluntary gift of £250 to his wife which was set aside on the application of the trustee in bankruptcy, and the wife was ordered to refund the money. She claimed to set-off a debt of £250 due to her by her husband, and Graham, J., held that she was entitled to do this; but the Court of Appeal (Williams, Moulton and Buckley, L.JJ.) held that the £250 claimed in respect of the voluntary settlement was not a debt due to the bankrupt from his wife, and therefore she had no right of set-off. Moulton, L.J., however, dissented from this conclusion. But the gift being void as against creditors, it would have been equally void as a preferential payment, and it would have been a curious result if it could have been retained on the ground of set-off.

VOLUNTEER—COMMANDING OFFICER—GOODS SUPPLIED TO VOLUNTEER REGIMENT ON CREDIT OF COMMANDING OFFICER—LIABILITY ON CONTRACT.

Samuel v. Whetherly (1908) 1 K.B. 184. In this case the decision of Walton, J., (1907) 1 K.B. 709 (noted ante, vol. 43, p. 446) to the effect that where a commanding officer of a vol-

unteer corps orders goods to be supplied to the corps, he is personally liable on the contract, has now been affirmed by the Court of Appeal (Lord Halsbury, L.C., and Barnes, P.P.D., and Bigham, J.). The Court of Appeal considered it was really a question of fact and that they were unable to dissent from the finding that the commanding officer intended to make himself liable to the defendants for the goods in question.

STATUTE RELIEVING INSURANCE MONEYS FROM LIABILITY FOR DEBTS
—CROWN—PREROGATIVE.

Attorney-General v. Curator of Intestate Estates (1907) A.C. 519. This was an appeal from the Supreme Court of New South Wales. By an Australian statute the proceeds of insurance policies on the lives of deceased persons were exonerated from liability for the debts of the deceased insured. On behalf of the Crown it was claimed that notwithstanding this provision the Crown was entitled to recover payment of debts out of such moneys. The Colonial Court held that the Crown was by necessary implication bound by the statute, but the Judicial Committee of the Privy Council (the Lord Chancellor and Lords Ashbourne and Macnaghten, and Sir A. Wilson and Sir A. Wills) reversed the decision. We may observe that the debt due to the Crown in this case was payable in respect of the maintenance of the deceased in a public lunatic asylum.

DENTISTS' REGISTER — REMOVAL OF NAME OF DENTIST FROM
REGISTER—PROFESSIONAL MISCONDUCT.

In *Clifford v. Timms* (1908) A.C. 12, the House of Lords (Lord Loreburn, L.C., and Lords Halsbury, Macnaghten and Atkinson) have dismissed the appeal from the decision of the Court of Appeal (1907) 2 Ch. 236 (noted ante, vol. 43, p. 722). Their Lordships were of the opinion that it was a matter of indifference whether the order of the General Medical Council should be admitted or not, because, as their Lordships held, the advertisements issued by the appellant themselves constituted the gravest professional misconduct by reason of their insinuating that other practitioners did not take the precaution to sterilize their instruments, and that the honour of female patients was not safe in the hands of other practitioners.

Clifford v. Phillips (1907) A.C. 15 is an appeal in a case of the like nature, from the judgment of the Court of Appeal (1907) 2 Ch. 236, and met with the like fate.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

N.S.]

MACILREITH v. HART.

[Feb. 18.]

Municipal corporation—Unlawful expenditure—Action by rate-payers—Intervention of Attorney-General—Validating Act—Right of appeal.

Prior to the passing of the Act of the Legislature of Nova Scotia, 7 Edw. VII. c. 61, the city council of Halifax had no authority to pay the expenses of the mayor in attending a convention of the Union of Canadian Municipalities. Where a municipal council illegally pays out the money of the municipality an action to recover it back may, if the council refuses to allow its name to be used, be brought by one, on behalf of all, of the ratepayers and need not be in the name of the Attorney-General. Pending such an action the legislature passed an Act authorizing payment by the council of any sums for principal, interest and costs incurred by the defendant "in the event of judgment being finally recovered by the plaintiff."

Held, per FITZPATRICK, C.J., and MACLENNAN, J., that the words quoted meant that the case was to be prosecuted to a finality including any possible appeal and did not put an end to the appeal to the Supreme Court of Canada.

Per FITZPATRICK, C.J., and MACLENNAN, J.—*Quære*, should not the action have been brought on behalf of all the ratepayers and inhabitants of the municipality?

Appeal dismissed with costs.

F. H. Bell, for appellant. *Allison*, for respondent.

Que.] TANGUAY v. CANADIAN ELECTRIC LIGHT CO. [Feb. 18.]

Constitutional law—Crown domain—Floatable streams.

The beds of rivers and streams in the Province of Quebec which are floatable for loose logs (*bûches perdues*) alone are

not a part of the Crown domain, but belong to the riparian owners. Appeal dismissed with costs.

Lane, K.C., for appellants. *Stuart*, K.C., and *Pelletier*, K.C., for respondents.

N.W.T.] UNION INVESTMENT CO. v. WELLS. [Feb. 18.

Promissory note—Interest payable by instalments—Indorsement after default—Overdue note—Good faith.

Where a promissory note is payable at a certain time after date with interest payable periodically during its currency, the non-payment of an instalment of such interest does not make it an overdue note.

The doctrine of constructive notice does not apply to bills and notes transferred for value. Appeal allowed with costs.

Ewart, K.C., for appellant. *Hudson*, for respondent.

Province of Ontario.

COURT OF APPEAL.

Full Court.] RUSSELL v. CITY OF TORONTO. [Jan. 7.

Sale of land for taxes—Invalid assessment—Purchase of lands by city—Delegation of powers to official—Personal service on owner—Ejusdem generis.

On a sale of land for taxes for the years 1892-1896, the fullest description given in the assessment rolls, except that in some of the years the depth was given, was that for the year 1893, namely: "Carlaw Avenue East, south end, commencing 120 feet from Queen, vacant land, owner John Russell (the plaintiff) 1242, 8 $\frac{57}{100}$ acres," not stating on which side of Queen Street it was, and, as a matter of fact, it was 132 feet therefrom, and not vacant. Before the date to which the sale had been adjourned for want of bidders, or by reason of the bidders

being below the amount in arrear, the Board of Control made a report to the Council which, after referring to the powers confined on the municipality to purchase land in such cases, recommended that the assessment commissioner be authorized to purchase and acquire for the city such lands as might be deemed advisable. This was adopted by the council, the owner, who was an alderman, being present, and voting in favour of it. Notice of such adjourned sale and of the intention of the city to purchase was duly advertized in the daily newspapers and in the *Ontario Gazette*, but no written notice was served personally on the owner, but he knew of the land being taxed, and of its being offered for sale, and had paid part of the taxes for the three first years.

Held, MEREDITH, J.A., dissenting, that the description was insufficient, and that personal service of the said notice on the owner was essential.

Per GARROW and MEREDITH, JJ.A.—It was not essential under sections 183 and 184 of the Assessment Act, R.S.O. 1897, c. 224, that the council should consider and determine as to each specific lot to be purchased, but could delegate such power to the assessment commissioner as one of its officers.

Section 8 of 3 Edw. VII. c. 86(O.), after, in general terms, validating and confirming all sales, proceeded to specify irregularities in the assessment, but not specifying an invalid assessment, and as to the failure to comply with the provisions of sections 183 and 184; and concluded: "and notwithstanding any failure or omission by the city or any official of the city to comply with any requirement of the said Acts, and notwithstanding anything to the contrary in either of the said Acts contained," namely, the Assessment Act in the R.S.O., and the Municipal Act, 1903.

Held, MEREDITH, J.A., dissenting, that the defects were not cured by the said Act; that the ejusdem generis doctrine applied, and that the Act was only applicable to the specific cases referred to and cases of a like character.

The sale was therefore held bad, and the deed to the city set aside, and the owner held entitled to redeem the lands on payment of the amount of taxes in arrear and interest. Judgment of MacMahon, J., at the trial affirmed.

H. Cassels, K.C., and *R. S. Cassels*, for plaintiff, respondents.
Fullerton, K.C., and *Chisholm*, for defendants, appellants.

Full Court.] DUNCAN v. TOWN OF MIDLAND. [Jan. 22.

Municipal law—Local option by-law—Requisite two-thirds majority obtained—Two weeks allowed for scrutiny—Final passing by council before expiry thereof—Refusal to quash.

By sub-s. 11 of s. 141 of R.S.O. 1897 c. 141, the Municipal Council may pass a local option by-law, provided that before the final passing thereof it has been approved by the electors "in the manner provided by the sections in that behalf of the Municipal Act;" but by s. 24 of 6 Edw. VII. c. 47(O.), if three-fifths of the electors voting on the by-law approve of it the council shall within six weeks thereafter finally pass it, and that the duty so imposed may be enforced by mandamas or otherwise.

Held, per OSLER and GARROW, JJ.A.—The provisions of the Municipal Act, sections 369 and 374, as to the ascertainment by the clerk of the result of the voting and as to the right to a scrutiny, apply to a by-law of this kind; and, therefore, the by-law should not be finally passed by the council until the expiration of the two weeks next after the clerk has declared the result of the voting thereon; but as the fact of there being the requisite two-thirds majority and no attempt made to obtain a scrutiny, and the only objection made was as to the faulty third reading, and as this was only a formal and ministerial act, as the council could be compelled to pass the by-law, nothing would be gained by quashing it.

Per MACLAREN and MEREDITH, JJ.A.—The bylaw could properly be passed by the council at any time within the six weeks, notwithstanding the non-expiry of the two weeks for the scrutiny, so long as there is a three-fifths majority, there being nothing to prevent a scrutiny be had afterwards.

Moss, C.J.O., agreed in the result.

Judgment of Divisional Court affirmed and judgment of MULOCK, C.J., reversed.

J. B. Mackenzie, for appellants. *F. E. Hodgins*, K.C., for respondents.

Full Court.] MONTGOMERY v. RYAN. [Jan. 22.

Banks and banking — Overdrawn account—Collateral securities —Transfer to third person—Inspection of account—Interest —Compounding.

R., having had an account with a bank for many years pre-

vious to the 16th July, 1906, was on that day indebted to the bank in a large sum for moneys advanced, for which the bank held securities pledged to them by R. and a promissory note made by R., payable on demand, for a sum larger than the amount then due. M. had been negotiating with the bank for an assignment of the debt due to R., and had been permitted by the bank to see the entries in their books relating to that debt, and, on the day mentioned, the bank assigned to M. the sum due and all the securities held by them, covenanting that the sum named was due and to produce and exhibit their books of account and other evidence of indebtedness, etc. The pledged securities were handed over to M., and afterwards the demand note, upon which he sued R., who brought a cross-action against the bank and M. for an account and damages and other relief.

Held, 1. The bank was not prohibited by section 46 of the Bank Act, 1890, from allowing M., for the purposes mentioned, to inspect the account of R. with the bank; that the agreement was not invalid; that M. was entitled to succeed in his action upon the note, and that R.'s action failed.

2. MEREDITH, J.A., dissenting. The bank were not entitled to charge R. compound interest; but where the bank had made a discount or an advance for a specified time and had reserved the interest in advance, this should be allowed; in other cases, where there had been an overdraft, and payments had been made, interest should be reckoned up to the date of each payment, and the sum paid applied to the discharge of the interest in the first place, and any surplus to the discharge of so much of the principal.

Judgment of CLUTE, J., reversed.

Shepley, K.C., for the Bank of Montreal, appellants. *C. Millar*, for Montgomery, appellant. *Watson*, K.C., and *N. Sinclair*, for Ryan, respondent.

Full Court.]

WOODS v. PLUMMER.

[Feb. 10.

Slander—Privileged occasion—Malice—Evidence of.

The defendant, the yard master in a railway yard, forthwith reported to the train master, to whom it was his duty to report, that he had seen the plaintiff, a car examiner, break into a car and take therefrom a bundle of handles, whereupon the train

master reported it to the company's detective, and, some four days afterwards, the plaintiff was called into the company's office, the train master, the detective and a couple of other officials being present, and, on his denying any knowledge of the handles, the defendant was called in, and on being questioned thereto, made the charge already referred to. In an action for slander brought by the plaintiff against the defendant the plaintiff stated that shortly before being called into the office he had met the defendant, who informed him of the car having been broken open, but that he did not know who did it.

Held, that while the occasion on which the alleged defamatory statement was made was one of qualified privilege, the statement made by the defendant to the plaintiff was evidence of the defendant's disbelief in the truth of the charge, and therefore of malice to go to the jury to displace the protection afforded by the privileged occasion.

Judgment of the Divisional Court reversing the judgment of ANGLIN, J., at the trial, affirmed.

Wallace Nesbitt, K.C., and Harding, for appellant. R. S. Robertson, for defendant.

HIGH COURT OF JUSTICE.

Boyd, C., Magee, J., Mabee, J.]

[Jan. 22.

ALLAN v. PLACE.

Fi. fa. goods—Equity of redemption in goods—Bona fide sale before seizure.

On August 15, the defendant agreed to purchase the stock in trade and fixtures of a grocery and meat business carried on by B. at 85 cents on the dollar, on an amount to be ascertained by stock taking. On the 17th she paid \$40 on account, and on the 23rd, the stock taking having been completed and the amount ascertained to be \$977.69, she gave her cheque for \$400 and a promissory note for 6537.69, being the balance of the amount due and entered into possession. The goods and chattels were subject to an overdue chattel mortgage for \$810 and interest, on which B. paid the mortgage, \$100, in cash, and endorsed over to him the note, which was paid at maturity. On the 18th

the plaintiff placed a fi. fa. goods in the sheriff's hands for \$365 on a judgment recovered against B.; but no seizure was made until October 25.

Held, that under R.S.O. 1897, c. 77, s. 17(O.), as amended by 62 Vict. c. 7, s. 9, s.-s. 2(O.), and 3 Edw. VII. c. 7, s. 18(O.), the writ did not bind the goods until seizure, and in the meantime the defendant had acquired the title thereto.

Griffiths, for respondent, appellant. *Lynch Staunton*, K.C., for plaintiff, respondent.

Province of Manitoba.

KING'S BENCH.

Mathers, J.]

C. L. B. Co. v. X. Y.

[Jan. 20.]

Execution—Exemptions—Seizure of goods for the price of which the action was brought—Suit on bill of exchange given for such prices.

Under sub-section (c) of section 29 of the Executions Act, R.S.M. 1902, c. 58, the books of a professional man are exempt from seizure under execution, but section 36 provides that nothing in the Act shall be construed to exempt from seizure such books if the purchase price of them is the subject of the judgment proceeded upon by way of execution.

The plaintiffs had sued only upon a bill of exchange accepted by the defendant for the price of the books.

Held, that the purchase price of the books seized was, nevertheless, "the subject of the judgment proceeded upon" within the meaning of section 36 of the Act, and that they were not exempt. Black on Executions, par. 217; 18 Cyc. 196; 12 Am. & Eng. Ency. 175, followed.

Burbidge, for plaintiffs. Defendant in person.

Mathers, J.]

SCHATSKY v. BATEMAN.

[Feb. 6.]

Practice—Replevin—Præcipe order for.

The plaintiff's action was for replevin of a team of horses.

Under Rule 862 of the King's Bench Act, he took out an order on præcipe for the replevin of the team. This order was made out in Form No. 112 referred to in Rule 865 and embodied a direction to the sheriff not only to seize the team, but to hand them over to the plaintiff, contrary to the express provision of Rule 869.

The sheriff carried out the order and turned over the team to the plaintiff.

Held, that the defendants were entitled, under Rule 864, to have the replevin order set aside with costs, the horses to be delivered back to the defendants, the sheriff to be protected from any action and to have his costs paid by defendants and added to their costs.

Levinson, for plaintiff. *Burbidge*, for defendants. *A. B. Hudson*, for the sheriff.

Bench and Bar.

APPOINTMENTS.

Walter Gibson Pringle Cassels, of the City of Toronto, Province of Ontario, one of His Majesty's Counsel, learned in the law, to be the judge of the Exchequer Court of Canada, in the room and stead of the late Mr. Justice Burbidge, deceased.

(March 2.)

The ignoble but embarrassing subject of tips to waiters has been ennobled by a solemn judgment in the English Court of Appeal. The effect of the decision is that tips received by a waiter ought to be taken into consideration as part of his weekly earnings, and it came up in a case as to assessing compensation under the Workmen's Compensation Act. The Court of Appeal, however, made it clear that their decision would not extend to tips which would involve or encourage any breach of duty on the part of the recipient to his employer, or which were casual or sporadic or trivial in amount.

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NO 7.

CHAIRMAN OF THE BOARD OF RAILWAY COMMISSIONERS.

Hon. James Pitt Mabee, one of the justices of the Supreme Court of Judicature for the Province of Ontario, has been appointed to succeed the late Hon. A. C. Killam as Chairman of the Board of Railway Commissioners. The appointment is commended in all quarters as an excellent one.

The new Chief Commissioner was appointed to the High Court Bench of Ontario less than three years ago, and during that period his rulings have been marked with strong common sense and a sound appreciation of the principles of law applicable to the business affairs of this country. Being free from all prejudices or fads he may safely be relied upon in his new sphere to do what is right in the interest of the country, without unjustly imposing too onerous burdens on the public service corporations which are under the control of the Board.

A not unimportant matter is the fact that Mr. Mabee, since his promotion to the Bench, has evinced the desirable judicial qualities of industry, patience and courtesy. He was a judge who listened, without talking, and then quietly and definitely made up his mind. It may be that he has not all the gifts which made his predecessor, Mr. Killam, so distinguished as a pure lawyer; but his many other qualifications will, we venture to think, be found eminently in keeping with the functions of the important and responsible tribunal over which he has been called upon to preside. Its duties, moreover, will fit in with his personal inclinations as to work, so that he will at once find himself at home in the business atmosphere that will surround him.

The Government is to be congratulated upon its selection. Mr. Mabee is in the prime of life and has contracted the invaluable habit of deciding matters promptly. He has happily a strong constitution and possesses in this respect as well as in others the characteristics which the position demands.

*MEMORIAL OF THE LATE CHRISTOPHER
ROBINSON, K.C.*

Shortly after the death of the late Christopher Robinson, K.C., a meeting of the Bar was called to consider the best means of perpetuating his memory, and it was decided that a fitting commemoration would be (1) a brass tablet with suitable inscription placed in Osgoode Hall, Toronto; (2) a scholarship founded in connection with the Law Society of Upper Canada to be known as "The Christopher Robinson Scholarship." In order that the profession generally might have the opportunity of contributing to the necessary fund, subscriptions were limited to the amount of five dollars each.

The matter was set on foot without delay, with the result, that the tablet has now been placed in the east wing of Osgoode Hall, opposite to the memorial of Attorney-General Macdonnell, who fell beside Brock at the battle of Queenston Heights. The inscription is as follows:—

"This tablet is placed here by the Bench and Bar of the Province of Ontario, in loving memory of Christopher Robinson, K.C. Born January 21, 1828. Died October 31, 1905."

Through the courtesy of Mr. Angus MacMurchy, K.C., who has acted as honorary secretary of the committee, we have received a copy of the committee's final report and statement. The subscriptions to the scholarship fund were received, not only from the Bench and Bar in the Province of Ontario, but also from those in other provinces of the Dominion, shewing the wide-spread interest taken in the proposed scheme, and testifying to the universal feeling of regret at the loss which the profession had sustained by Mr. Robinson's death. Here, it is pleasing also, to record the debt which we all owe to Mr. MacMurchy for his untiring zeal in bringing the matter to a successful issue.

A deed of trust has been executed whereby the fund, less the cost of tablet, etc., has been delivered to a trust company for investment, to secure the annual amount required for the scholarship.

This scholarship, which is to be open for competition every year to students of the graduating class of the Law School, is to be awarded partly in books and partly in money, for the best essay on a selected subject within three months after the final examinations of the school. The names of successful candidates, from time to time, are to be entered in the curriculum of the Law School, under the heading of "Christopher Robinson Prize-men," and their names are to be placed on a suitable board or tablet to be provided for that purpose in Osgoode Hall.

It is most fitting that the name of one so beloved and respected by the profession should thus be perpetuated for coming generations among students of the law, as an incentive to the attainment of the like great learning and high ideals of professional character which were the distinctive features of the career of that great and good man, so long a leader of the profession in Canada, and always to be remembered as one of its most notable ornaments.

ELECTION OF BENCHERS IN ONTARIO.

Years ago we called attention to this subject, (1901, pp. 177, 257). We then referred to the unsatisfactory system handed down from the dim past, and suggested a change, saying:—"All this points to the desirability of giving a freer choice, by having nominations made, as we have already suggested. There should not be, as there is in fact now, a canvass made by the retiring Benchers for their re-election, by the very simple but effectual process of sending, as is now required, a list of the retiring Benchers to the whole profession. This should cease, and nominations should be sent in to the secretary, who should then send to those entitled to vote the list of names on the nomination papers. This is what is done in connection with elections for the Senate of the University, and other bodies where it is desired to secure the best representation."

A bill has now been introduced by the Attorney-General providing for the nominations of candidates (the word is objec-

tionable, but used for want of a more appropriate one) whose names are to be sent to the Bar wherefrom to elect the required thirty Benchers. Various clauses of the bill provide the appropriate machinery and safeguards in connection with the proposed change. This new departure coming from the source it does and being so reasonable and desirable will doubtless be carried out. The Bar will, we feel sure, appreciate the action of Hon. Mr. Foy.

PREMATURE BURIALS.

We have a suggestion for those of our legislators who desire to justify to their constituents their existence as such. In our various legislatures are annually introduced innumerable undigested ideas in the way of bills, which generally find their resting place in the waste-paper basket. In the Province of Ontario, many members who know very little of the statutes other than the Municipal and Assessment Acts exploit what they know on those subjects by petty amendments, which would not infrequently spoil the symmetry of the existing legislation, and introduce greater defects than they would cure.

The legislation we refer to as being desirable ought to be fathered by the Government, but perhaps like many other valuable reforms it may, properly enough, be initiated by some private member.

It has been established, lately, beyond question, that many persons buried under the supposition of their being dead, have vainly recovered consciousness in their last resting places. The subject is a gruesome one, but this should not prevent due attention being paid to it.

It is undeniable that physicians too often give certificates of death without realizing the importance of their act, or the responsibility attaching thereto. They certify to somebody being dead, who very possibly may only be in a trance. If there is any truth in the stories we read, and notably a recent case of resuscitation by electrical treatment, it is high time that some attention was paid to this matter. There should be some strin-

gent legislation to prevent the signing of death certificates without having exhausted all means of ascertaining that death has actually taken place. This evil has so impressed itself upon the minds of some persons that they make provision in their wills to prevent themselves being buried alive.

It has been asserted by those who have made a study of this subject that the medical profession is inclined to minimize the result of its perfunctory performance of its duties in connection with this matter, but the facts disclosed by recent statistics, and the investigations of scientists, shew that there is need of legislation to enforce a more careful scrutiny. Carelessness in this matter on the part of those responsible is akin to murder.

NO EQUITIES AS BETWEEN ROGUES.

"He who comes into equity must come with clean hands" is a good maxim. Mr. Justice Houghton, sitting in the Appellate Division of the New York Supreme Court in the case of *Fay v. Herbert*, is the author of another equally trenchant maxim, which goes a little further in the same direction. He crystalizes his views on a case recently before him in the words: "Equity does not adjust differences between rogues." He considered that the plaintiffs were not entitled to legal protection in that they were engaged in a business which was a deceiving of the public for the sake of gain. He also laid down the rule that in equity proceedings the complainant is first to be judged, and until he has been found free from taint a Court of equity will not proceed to determine whether or not he has been wronged. These rules are wholesome and calculated to protect the public against itself, for people do certainly love to be humbugged.

The plaintiffs in the above case were husband and wife, giving entertainments through the country under the name of "The Fays." The principal performances consisted of alleged mind-reading and telling of future events, interspersed with sleight-of-hand tricks. The defendants were former employees,

who having learned the tricks of the trade themselves gave performances, explaining the plaintiffs' performances and exposing their alleged occult powers. In their advertising notices they gave prominence to the words, "The Fays" to such an extent that certain persons were deceived, and went to the defendants' performances thinking they were going to see the plaintiffs. The suit was for an injunction restraining the defendants from thus misleading the public. The judgment of the learned judge before whom the matter came on appeal is reported in *Albany Law Journal*, 1908, page 46. He says:—

"The situation disclosed is such that equity should not interfere at all. The plaintiffs are engaged in deceiving the public, and the most entertaining part of their performance is in effect fortune telling. In such a business they can get no property rights in a name or appellation which a Court of equity will protect. The property right which the plaintiffs assert they have in the term 'The Fays,' and which they would have if their business was without deception, is similar to the right to the use of a trade-mark. Equity will not interfere to protect a party in the use of a trade-mark where the name or phrase claimed as such is intended and calculated to deceive the public: *Fetridge v. Wells*, 4 App. Pr. 144; *Gluckman v. Strauch*, 99 App. Div. 361. A party invoking the aid of equity to restrain the infringement of a trade-mark must himself be free from fraud in his representations to the public: *P. M. Co. v. P. M. P. Co.*, 135 N. Y. 24. Persons who pretend to tell fortunes are defined to be disorderly persons (Criminal Code, section 899). The pretense of occult powers and the ability to answer confidential questions from spiritual aid is as bad as fortune telling and a species of it, and is a fraud upon the public. It is no answer so far as the plaintiffs are concerned that no one ought to believe the pretenses. It is the half doubt and the half belief of a certain class of people that make and hold the audiences. If every one wholly disbelieved curiosity would soon be satisfied and the entertainment lose its attraction. Nor is it any answer to say that the defendants are themselves

guilty of wrong. Equity does not adjust the differences between rogues. The complainant is first judged, and not until he has been found free from taint does equity proceed to determine whether or not he has been wronged. The injunction should not have been granted. The judgment is reversed and a new trial granted, with costs to the appellant to abide the event."

THE CRIME OF PERJURY.

That the crime of perjury is much in evidence, and apparently on the increase, has been asserted and is probably correct. Articles many have been written on the subject in legal journals, calling attention to the evil. The Bench declaims against it, but nothing is done. Suggestions are not wanting. One is that if lawyers would discountenance false swearing on the part of their own clients and ask for judicial protection when committed by their adversaries, the crime would at once grow less. Others say that justice should be meted out to false witnesses by summary action on the part of the presiding judge, one writer saying, "the perjurer would no more dare to come forward in our Courts than in the English Courts, if he knew that our trial judges were in the habit of committing perjurers on the spot, nor would any lawyer produce an obvious perjurer if he knew that to do so would mean his disbarment." He continues by saying that "the chief responsibility for perjury in the Courts is with the trial judges themselves, because they have the power to stop it, and do not."

It is much easier to dilate upon an evil than to suggest a remedy, for the difficulties attendant upon this question are many, and need not at present be enlarged upon. Must it be left to the advancement of civilization and the supposed growing morality of the world in the future, as to which it clearly must stand till the millenium; or are the judges to take a hand in, running the risk of doing an occasional act of injustice for the benefit of the community? The law is clear enough, the application of it is the difficulty.

AMENDMENT TO COPYRIGHT ACT.

A useful and practical amendment of the Copyright Act, introduced in the House of Commons by Mr. A. C. Macdonell, K.C., became law on March 17th. Under the old section, which has been in force for many years, the notice for copyright was in the following words:—"Entered according to Act of the Parliament of Canada in the year 1908, by A. B., at the Department of Agriculture." This form, while comparatively unobjectionable in books, was cumbersome and disfiguring on engravings, photographs, and art postcards. The new wording is very simple, viz:—"Copyright, Canada, 1908, by A. B.," and indicates sufficiently the fact of copyright, the country, the date, and the owner of the copyright. Publishers and others will appreciate Mr. Macdonell's amendment.

VALUATION OF THE PROPERTY OF PUBLIC SERVICE COMPANIES.

When the property of a public service company is taken by a state or municipality under condemnation proceedings, *Matter of Brooklyn* (1894), 143 N.Y. 596, or under contract leaving the purchase price to be subsequently determined, *Matter of Water Com'rs.* (N.Y. 1902), 71 App. Div. 544, the problem of ascertaining the fair and just compensation has proven to be most vexatious and one upon which the Courts have shewn no little divergence of opinion. Several theories, none of them exclusive, have been advanced: first, the original cost of the plant to the company; *Montgomery County v. Schuylkill Bridge Co.* (1885), 110 Pa. St. 64; *West Chester, etc., Co. v. Chester County* (1897), 182 Pa. St. 40; second, the present cost of reproduction; *Brunswick, etc., Water Dist. v. Maine Water Co.* (1904), 99 Me. 371, 382; *Matter of Water Com'rs.*, supra; third, the capitalized value of its net income; *Nat'l Water Works Co. v. Kansas City* (1894), 62 Fed. 853; and fourth, the market value of its stock. *Mifflin Bridge Co. v. Juniata County* (1891), 144 Pa. St. 365; *Montgomery County v. Schuylkill Bridge Co.*, supra. The first consideration—that of original cost—has received considerable attention from the Courts. In order, however, for it

to have any bearing upon present value, the extent of depreciation of the plant must be considered; *Kennebec Water Dist. v. Waterville* (1902), 97 Me. 185; moreover, there must be assurance that there were no fraudulent transactions and that the money was legitimately and wisely spent in the construction. *Brunswick, etc., Water Dist. v. Maine Water Co.*, supra. In the few cases in which original cost is considered to be the controlling element, the value of the franchise is added. *Montgomery County v. Schuylkill Bridge Co.*, supra; *Clarion Turnpike Co. v. Clarion County* (1896), 172 Pa. St. 243; *West Chester, etc., Co. v. Chester County*, supra. The objection to this test is that it may force the State to pay for an antiquated plant an amount greatly exceeding the cost of a modern and more efficient system. The second test—cost of reproduction—has received less consideration from the Courts, seemingly on account of its severity; see, *Matter of Water Com'rs.* (1903), 176 N.Y. 239, and in some cases has been entirely rejected. *Montgomery County v. Schuylkill Bridge Co.*, supra; *Metropolitan Trust Co. v. H. & T. C. Ry. Co.* (1898), 90 Fed. 683. Value is thus determined in the competitive business field, but this rule is less applicable to public service callings because the capital can generally be less easily diverted to other channels, and more especially because they are subject to regulation and supervision. Here, likewise, the franchise must be separately considered. See, *Nat'l. Water Works Co. v. Kansas City*, supra. The third and fourth tests are very similar and both superficial, though sometimes considered. *Mifflin Bridge Co. v. Juniata County*, supra. Under these tests value depends upon the income received, which is governed by the rates charged. But since the rates which may lawfully be charged may only be a fair return upon the value of the property, it is begging the question to say that value then depends upon rates. See *Brunswick, etc., Water Dist. v. Maine Water Co.*, supra. If the rates are assumed reasonable, the results reached by these methods will, of course, approximate the valuation upon which the rates are theoretically based. The fact that the plant is a "going concern" is

universally conceded to be a proper subject for compensation. *Edinburg, etc., Co. v. Edinburg* (1894), 71 L.T. Rep. 301; *Gloucester, etc., Co. v. Gloucester* (1901), 179 Mass. 365, 383; *Newburgport, etc., Co. v. Newburgport* (1897), 168 Mass. 541. Good will might well be considered if competition exists, but not if the company has a monopoly, for its customers have no choice. *Kennebec Water Dist. v. Waterville*, *supra*. For the most part, the Courts have refused to confine themselves to any single test, but say that all must be taken into consideration. This amounts to a practical confession that they are helpless to formulate a rule to cover a difficult and intricate situation and is simply an attempt to reach an equitable result in each case. See *Nat'l Water Works Co. v. Kansas City*, *supra*; *Brunswick, etc., Water Dist. v. Maine Water Co.*, *supra*; *Kennebec Water Dist. v. Waterville*, *supra*.

The question of valuation of the franchise is usually separately considered. That it is property, *West River Bridge Co. v. Dix* (1848), 6 How. 507, and may not be directly taken without compensation, is generally recognized, *Monongahela Navigation Co. v. United States* (1892), 148 U.S. 312; *People v. O'Brien* (1888), 111 N.Y. 1, though the same result can be indirectly reached by granting other franchises so that the resulting competition would be ruinous. *Charles River Bridge v. Warren Bridge* (Mass. 1837), 11 Pet. 420; *Syracuse Water Co. v. City of Syracuse* (1889), 116 N.Y. 167. In computing its value, consideration must be taken as to its character, whether it be exclusive or non-exclusive, *Brunswick, etc., Water Dist. v. Maine Water Co.*, *supra*; *Gloucester, etc., Co. v. Gloucester*, *supra*, the length of time it is to run, *Kennebec Water Dist. v. Waterville*, *supra*; *Sunderland Bridge Case* (1877), 122 Mass. 459, 466, and whether or not it be subject to forfeiture. See *Kennebec Water Dist. v. Waterville*, *supra*; *Bridge Co. v. United States* (1881), 105 U.S. 470, 482. If but part of a franchise is condemned, compensation must be made to the extent to which it has been impaired. *United States v. Gettysburg Electric R.R.* (1896), 160 U.S. 688. Franchise valuation is generally meas-

ured with reference to rates which the company has charged, in order to compute what its revenue would probably have been during the unexpired period. *Sunderland Bridge Case*, supra; *Montgomery County v. Schuylkill Bridge Co.*, supra. In a recent English case, a municipality entered into a contract to purchase a street railway when it should be constructed. It was held that the price paid should be the value as a structure, including the element of a going concern, but excluding the franchise value. *Mayor, etc., of Dudley v. Dudley, etc., Ry. Co.* (1907), 97 L.T. Rep. 556. This result was reached upon the interpretation of the contract, but under the Tramways Act of 1870, similar results have been reached in the absence of contract, *Stockton, etc., Water Board v. Kirkleatham Local Board* (1894), 69 L.T. Rep. 661; *Edinburg, etc., Co. v. Edinburg*, supra, though in estimating value for the purpose of taxation, the franchise has been considered. *Pimlico, etc., Co. v. Assessment Committee* (1874), 29 L.T. Rep. 605; *The King v. Lower Mitton* (1829), 9 B. & C. 810. This distinction is not illogical, for retaking without compensation would proceed on the ground that the franchise was granted gratuitously on the ground of benefits received.—*Columbia Law Review*.

A young Russian artist has recently been sentenced, in St. Petersburg, to fifteen years' penal servitude for caricaturing the Czar. From our point of view in this country any such effort would be quite unnecessary as almost every item of news from that barbarous country connected with their "Little Father" brings him increasingly into contempt. A Frenchman once collected from the comic press of the world some hundreds of caricatures of King Edward. The latter was pleased to accept a copy, and was doubtless much amused at seeing himself portrayed in unexpected and undignified attitudes. We object on principle to the use of bombs for educational or reformatory purposes, quite apart from the fact that they too often kill the wrong man; but such a sentence for such an offence takes off the edge of pity when the right man is reached.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

NULLITY OF MARRIAGE—MARRIAGE IN ENGLAND BETWEEN ENGLISHWOMAN AND DOMICILED FRENCHMAN—IRREGULARITY BY FRENCH LAW—DECREE OF NULLITY BY FRENCH COURT ON GROUNDS NOT RECOGNIZED BY ENGLISH LAW—CONFLICT OF LAWS—LEX LOCI CONTRACTUS—BIGAMY.

In *Ogden v. Ogden* (1908) P. 46 the Court of Appeal (Cozens-Hardy, M.R., and Barnes, P.P.D., and Kennedy, L.J.) have affirmed the judgment of Deane, J. (1907) P. 107 (noted ante, vol. 43, p. 352). The action was brought for a declaration of nullity of marriage on the ground that the defendant, at the time of the pretended marriage, was in fact the wife of another man. The facts were that in September, 1898, the defendant, an Englishwoman, married in England a Frenchman then temporarily resident in England but who was domiciled in France. According to French law the husband, being then 19 years of age, could not validly contract marriage without the consent of his father. The parties cohabited and a child was born on July 7, 1899. The husband's father afterwards instituted proceedings in a French Court and the marriage was annulled on the ground of want of consent of the father, it appearing by the decree of the Court that the wife claimed that the marriage should take civil effect, and that she should be allowed alimony, and an allowance for the support of the child, which claims, except that for support of the child, were disallowed. After this decree the husband married again in France, and the defendant married the plaintiff. The question therefore was whether the decree of the French Court annulling the marriage of September, 1898, was valid according to English law. Deane, J., held that it was not, and his decision is now affirmed. It appears by the report that after the French decree of nullity, the wife commenced a suit for divorce in England which had been dismissed because the husband was domiciled in France; and it further appeared that the French Court could not grant a divorce because it had already declared the marriage null. The wife was, therefore, in a very anomalous position, she was married in England but not in France, her husband had married again and was living with another woman and yet in neither country could

his wife get any relief. The Court of Appeal suggest that such a state of facts ought to constitute an exception to the ordinary rule that the Court will not exercise jurisdiction to grant a divorce except when the parties are domiciled within its jurisdiction.

SHIP—CONTRACT OF AFFREIGHTMENT—DAMAGE TO GOODS—UNSEAWORTHINESS—CAUSE OF DAMAGE.

The Europa (1908) P. 84 was an action by the charterers of a ship against the ship owners on a contract of affreightment. The case raised the question whether seaworthiness is a condition precedent in a contract of affreightment, to the extent, that if the ship be unseaworthy, the shipowner is reduced to the position of a common carrier, and liable for all damages occasioned to the cargo to which the contract relates, even if such damage be solely caused by an excepted peril and not by the unseaworthiness. This question a Divisional Court (Deane and Bucknill, JJ.) answered in the negative.

WILL—CONSTRUCTION—LIFE INTEREST TO WIFE “IF SHE SHALL SO LONG CONTINUE MY WIDOW”—BIGAMOUS MARRIAGE—“WIDOW.”

In re Wagstaff, Wagstaff v. Jalland (1908) 1 Ch. 162. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have affirmed the judgment of the late Kekewich, J. (1907) 2 Ch. 35 (noted ante, vol. 43, p. 616). A testator who at the time he went through a form of marriage with a Mrs. Josephine Jalland, knew that her husband was still living. Mrs. Jalland thereafter lived with him as his wife till his death. By his will he gave certain of his chattel property to his “dear wife, Dorothy Josephine Wagstaff,” the same person as Josephine Jalland, and also devised and bequeathed the residue of his real and personal estate to his “said wife” during her life “if she so long continue my widow,” and upon her decease or second marriage then over. The question was whether Josephine Jalland could take under the residuary devise and bequest as widow of the testator. Kekewich, J., held that the word had obtained a secondary meaning in the will, and sufficiently designated the person intended to be benefitted, and that Mrs. Jalland was consequently entitled to a life estate in the residue until she contracted another marriage subsequent to the death of the testator.

ANCIENT LIGHT—ENJOYMENT—"CONSENT OR AGREEMENT"—
 CONSENT OR AGREEMENT AS TO LIGHTS BY TENANT—PRE-
 SCRIPTIO ACT 1832 (2-3 WM. IV. c. 71) ss. 3, 4—(R.S.O.
 c. 133, s. 35.)

Hyman v. Van Den Burgh (1908) 1 Ch. 167. In this case the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have affirmed the judgment of Parker, J. (1907) 2 Ch. 516 (noted ante, p. 25). The Court of Appeal point out that under the Prescription Act a right to access of light is not absolute and indefeasible, even after twenty years' enjoyment, unless and until some action is brought in which the right is called in question, and that until such action is brought the right remains inchoate and if within twenty years prior to any such action it can be shewn that the light in question was enjoyed by consent or agreement the inchoate right would be defeated. In this case after twenty years' enjoyment but within twenty years before action a tenant in possession of the premises had agreed to avoid the blocking up the lights in question to pay one-half a year therefor. He never paid the one-half but it was held that this amounted to an enjoyment by "consent or agreement" within the statute so as to prevent the acquisition of an absolute right under the statute.

APPOINTMENT OF NEW TRUSTEE—APPOINTMENT BY ACTING EX-
 ECUTOR OF LAST SURVIVING TRUSTEE—TRUSTEE ACT (23-24
 VICT. c. 145) s. 27—(R.S.O. c. 129, s. 4.)

In re Boucherett, Barne v. Erskine (1908) 1 Ch. 180. The question to be decided was whether a new trustee of a will had been validly appointed. A testator by his will made in 1875 devised his real estate to trustees. The will contained no power to appoint new trustees, but in effect referred to the powers given by 23-24 Vict. c. 145, (R.S.O. c. 129). The last surviving trustee died in 1888 having by his will appointed three executors. Probate was granted to one of the executors power to prove being reserved to the other two. In 1894 the proving executor appointed a new trustee of the first mentioned will. The other two executors were then alive, but died without taking probate. Joyce, J., held that the appointment was valid under 23-24 Vict. c. 145, (R.S.O. c. 129, s. 4) as having been made by the "acting executor" of the last surviving trustee; the saving clause in s. 76 of the Conveyancing Act, 1881, which had

repealed 23 and 24 Vict. c. 145, s. 27, having left that statute in operation as regards cases where it was incorporated expressly, or by implication, in prior instruments.

WILL—CONSTRUCTION—SPECIFIC DEVISE—COMPLETE GENERAL DESCRIPTION—SUBSEQUENT IMPERFECT ENUMERATION—FALSA DEMONSTRATIO.

In re Brocket, Dawes v. Müller (1908) 1 Ch. 185. A testatrix by her will devised the real estate to which she became entitled under the codicil of her father's will "namely the residence known as Orford House in the parish of Oakley and lands and hereditaments" (in certain parishes) "in the same country," to her sister for life with remainder over. In addition to the properties enumerated, the testatrix had also acquired under the codicil of her father's will a residence in London, to which she was entitled at the date of the will. There was no evidence whether she knew that it formed part of the property passing under the codicil. The question which Joyce, J., was called on to determine was whether the London house passed under the devise to the testatrix's sister, and he held that it did not, and that the specification of the properties introduced by the word "namely" was not a mere imperfect enumeration of the property intended to be devised, but formed the leading description of the property intended to be dealt with, and consequently the London house did not pass under the general introductory words.

LUNATIC—ACTION BY COMMITTEE—LUNATIC PLAINTIFF—"LUNATIC SO FOUND."

In re Townshend, Townshend v. Robins (1908) 1 Ch. 201. This was an action instituted by the committee of a lunatic so found, and the point was raised whether the lunatic should not be a co-plaintiff, and Eady, J., held that he should. He also held that where under the Lunacy Act after inquiry it was found that the alleged lunatic "is of unsound mind, so as to be incapable of managing his affairs, but that he is capable of managing himself, and is not dangerous to himself, or others," that such finding constitutes him "a lunatic so found by inquisition."

SOLICITOR AND CLIENT—SETTLED ACCOUNTS—OVER CHARGES—
OPENING SETTLED ACCOUNTS—STATUTE OF LIMITATIONS (21
JAC. 1, c. 16) s. 3—(R.S.O. c. 324, s. 38.)

Cheese v. Keen (1908) 1 Ch. 245 is a case of some interest to solicitors. The defendant was a builder and from 1883 to 1904 had employed one Cheese as his solicitor, who financed him in various transactions. No bills of costs were ever delivered, but from time to time accounts were stated and the amount due to Cheese for loans, interest and costs were agreed, and Cheese took mortgages for the agreed amounts. By 1904 all the mortgages except two were paid off. In 1905, Cheese died, and the present action was brought by his executors on the two mortgages remaining unpaid. Keen counterclaimed for an account of all transactions between himself and his deceased solicitor, and he alleged that he had no independent advice and that he had been charged profit costs prior to the Mortgagees' Legal Costs Act, 1895 (58-59 Vict. c. 25), and he also proved errors in respect of charges for interest. The plaintiffs relied on the Statute of Limitations, 21 Jac. 1, c. 16, s. 3, (R.S.O. c. 324, s. 38). Neville, J., held that the statute was no bar, and that the defendant was entitled to relief for which he counterclaimed, and he made an order for taxation and to take the accounts with leave to the defendant to surcharge and falsify.

AIR—EASEMENT—DEROGATION FROM GRANT.

Cable v. Bryant (1908) 1 Ch. 259 was an action to restrain the defendants from interfering with the plaintiff's right to the access of air to his premises. The facts were that the plaintiffs had purchased in 1905 from the Hatfield Breweries Company a piece of land with a stable on it. At the time of the purchase the stable was ventilated by apertures to which the air had access over an open yard which the grantors then owned in fee but which was rented to a tenant for an unexpired term of 28 years. After the grant to the plaintiff the Breweries Company sold the yard to the defendant, the tenant joining in the deed to merge the term. The purchaser thereupon proceeded to erect a hoarding which had the effect of entirely closing the ventilators of the plaintiff's stable. Neville, J., granted a mandatory injunction to remove the obstruction on the ground that the action of the defendant was in derogation of the grant which

the Breweries Company had made to the plaintiff, and that neither the company nor the defendant, as their assignee, could lawfully erect anything on the yard which would interfere with the use of the stable as a stable.

SETTLEMENT—COVENANT TO SETTLE AFTER ACQUIRED PROPERTY
—EXCEPTION OF PROPERTY SETTLED ON WIFE FOR HER SEPARATE USE—CONTINGENT INTEREST NOT FALLING INTO POSSESSION DURING COVERTURE.

In *Lloyd v. Prichard* (1908) 1 Ch. 265, Parker, J., held that, under a covenant in a settlement to settle after acquired property, except such as should be settled to the wife's separate use, property devised to the wife's separate use during the coverture, but which did not fall into possession until after the husband's death, was not bound by the covenant, but that a contingent reversionary interest acquired during the coverture, but which did not fall into possession during the coverture was bound.

COSTS—SOLICITOR AND CLIENT—TAXATION—COUNSEL RETAINED
CONTRARY TO CLIENT'S INSTRUCTIONS.

In *re Harrison* (1908) 1 Ch. 282. Parker, J., held that where a client had given his solicitor express instructions not to retain a particular counsel, the solicitor could not tax against his client any costs of brief or counsel fee to such counsel notwithstanding according to the rules of etiquette the counsel in question was entitled to be briefed.

WILL—CONSTRUCTION—PERSONAL ESTATE—GIFT TO "SURVIVING CHILDREN AND THEIR RESPECTIVE ISSUE"—ISSUE COMPETING WITH PARENTS.

In *re Coulden, Coulden v. Coulden* (1908) 1 Ch. 320. A testator by his will gave the income of his estate to his seven children in equal shares and provided that on the death of either of his executors that the survivor was "to sell the whole of my real and personal estate and cause the same to be equally divided amongst my then surviving children and their respective issue."

On the death of one of the executors, there were issue of two deceased children and there were four surviving child-

ren, one of whom had issue. No question was raised as to the realty, it being conceded that as to that the word "issue" must be construed as a word of limitation; but as to the personalty it was contended that there was no such rule and on behalf of the issue of one of the surviving children it was claimed they were entitled to share with their parent, and that the issue of children who had died prior to the period fixed for distribution must be excluded; but Parker, J., although holding that in a gift of personalty the word "issue" is not *prima facie* a word of limitation, although in some cases it may be so, but whether it is or not, is purely a question of construction, in the present case he came to the conclusion that the word "issue" was not used as a word of limitation, but that on the proper construction of the will the "issue" referred to were the issue of children who had died prior to the period of distribution, but the issue of those children living at that time were not included and did not take in competition with their parents.

SHIP—BILL OF LADING—CONSTRUCTION—"PORT INACCESSIBLE BY ICE"—"ANY OTHER CAUSE"—*EJUSDEM GENERIS*—"ERROR IN JUDGMENT" OF MASTER.

Tillmanns v. Knutsford (1908) 1 K.B. 185 was an action for breach of contract contained in a bill of lading. The bill of lading contained certain exemptions from liability by the charterers and ship owners in case of loss arising, *inter alia*, from error in judgment, negligence or default of . . . master, or other persons in the service of the ship whether in navigating the ship or otherwise. It also provided that should a port be inaccessible on account of ice, the master might discharge the goods intended for such port on the ice, or at some other safe port or place at the risk of the shippers. At the time the bill of lading was signed, the ship was under a time charter which provided that the master (although appointed by the owners) should be under the orders and directions of the charterers as regards employment agency or other arrangements, and the charterers thereby agreed to indemnify the owners against liabilities arising from the act of the master signing bills of lading by the order of the charterers, and were to be responsible for the delivery of cargo. The time charterers signed the bill of lading "for the captain and owners." It was held by Channell, J., that this signature bound the ship owners. It appeared that the vessel arrived within forty miles of the Port

of Vladivostock on February 12, in company with another vessel, but found it impossible to get in on account of ice, and after endeavouring, on that day and the following, without success, on February 14, left for Nagasaki, where the cargo was discharged. The other vessel tried again and got into Vladivostock on February 15, and evidence was given that between January 23 and February 28, Vladivostock was open and vessels were going in and out almost daily. Channell, J., held that inaccessible in the bill of lading did not mean inaccessible at the moment of the ship's arrival, but inaccessible within a reasonable time after the ship arrived off the port and endeavoured to get in, and, therefore, that the master was not justified in not making a more persistent effort to get into that port in the circumstances. He also held, that "error in judgment" by the master, did not include misconstruction by him of the bill of lading, and also, that the words "or other cause" must be taken to mean other causes ejusdem generis as those previously mentioned, and therefore, that the plaintiffs were entitled to recover for the loss occasioned by the non-delivery of the cargo at Vladivostock. This case has been affirmed by the Court of Appeal: see 124 L. T. Jour. 431.

AGREEMENT FOR CURRENT ACCOUNT—GENERAL LIEN FOR CARRIAGE OF GOODS—LICENSE TO TAKE POSSESSION OF GOODS—BANKRUPTCY OF DEBTOR—DAMAGE FOR TRESPASS CAUSING BANKRUPTCY—CAUSE OF ACTION PASSING TO TRUSTEE IN BANKRUPTCY—SET-OFF.

Lord v. Great Eastern Ry. (1908) 1 K.B. 195. This was an action by a trustee in bankruptcy of one Lord, to recover damages against the defendants for an alleged trespass committed against the bankrupt, which occasioned his bankruptcy. The facts of the case were that the defendants had agreed with Lord to let to him, at a monthly rental, a parcel of land for stacking coal unloaded from trucks on the defendants' railway sidings. The land was within the defendants' railway yard, and the defendants also agreed with Lord to open a monthly credit account for the carriage of coal, upon the condition that the defendants should have a lien on all the coal conveyed, and on the defendant's waggons, plant, etc., which should, at any time, be upon the defendants' railway or upon the ground rented by Lord from them; and the company was to be at liberty to close the account at any time on giving one day's notice, whereupon the whole account was to become due. The defendants closed the account

by giving the required notice, and thereupon took possession of the coal on the sidings and also the coal and other goods on the rented land, which was the act complained of. The plaintiff contended that the agreement amounted in effect to a bill of sale, and was altogether void because of non-registration, but Phillimore, J., who tried the action, refused to accede to that contention, and held the agreement was valid, and therefore that the plaintiff could not succeed. He was also of the opinion that even if the acts alleged did amount to trespass, the damages claimed therefor, and for causing Lord's bankruptcy, was a personal wrong which would not pass to the trustee. The company had set up that if they were liable to the plaintiff as alleged, they would, nevertheless, be entitled to set-off against any damages the trustee might have recovered, the debt due by Lord for carriage of the coal, etc., but on this point Phillimore, J., was against the defendants, as it was not a case of mutual dealings. This, however, was merely obiter.

STATUTORY POWER TO SUPPLY ELECTRICITY—POWER TO CONTRACT
—PENALTY FOR DEFAULT—BREACH OF CONTRACT—REMEDY,
WHETHER FOR PENALTY OR DAMAGES FOR BREACH OF CONTRACT.

Morris v. Loughborough (1908) 1 K.B. 205 is a case in which the defendant unsuccessfully endeavoured to apply the rule which was acted on recently by the Judicial Committee of the Privy Council in *Toronto v. Toronto Ry.*, viz., that where an act confers statutory powers and provides a penalty for breach of duty thereunder, that that is the only remedy which can ordinarily be pursued in case of breach. In this case the defendants were a municipal body and were by statute empowered and required to furnish to the inhabitants within a certain area, electricity when required, and in case of neglect to do so the statute imposed a penalty. The statute also empowered the defendants to enter into contracts with other persons not resident within the specified area to supply them with electricity. In pursuance of this latter power, the defendants contracted to supply the plaintiffs with electricity, and the present action was brought to recover damages for breach of that contract. The defendants contended that the only remedy was for the penalty, and Bigham, J., so held, but the Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L.JJ.) came to the conclusion that the penalty only applied to cases where the defendants failed to supply electricity within the defined area, and did

not have the effect of limiting the defendants' liability under contracts made with persons outside of the defined area. The judgment of Bigham, J., was therefore reversed.

**FACTOR—MERCANTILE AGENT—AUTHORITY OF FACTOR TO PLEDGE
—CUSTOM OF PARTICULAR TRADE—FACTORS ACT 1889 (52-53
VICT. C. 45) SS. 1, 2—(R.S.O. C. 150, S. 2).**

In *Oppenheimer v. Attenborough* (1908) 1 K.B. 221, the Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L.JJ.) have affirmed the decision of Channell, J., (1907) 1 K.B. 510 (noted ante, vol. 43, p. 396) to the effect that the authority conferred on a mercantile agent by the Factors Act, 1889, ss. 1, 2 (R.S.O. c. 150, s. 2) to pledge goods entrusted to them by the owner is unaffected by the custom of any particular trade that an agent employed to sell goods shall have no authority to pledge them.

**HUSBAND AND WIFE—GUARANTY SIGNED BY WIFE FOR HUSBAND'S
DEBT—UNDUE INFLUENCE OF HUSBAND—WANT OF INDEPENDENT
ADVICE—NOTICE TO CREDITOR OF RELATIONSHIP—
CREDITOR PROCURING GUARANTY THROUGH HUSBAND OF
GUARANTOR.**

Chaplin v. Brammall (1908) 1 K.B. 233 was an action against a married woman upon a guaranty given by her for her husband's debt. The facts were that the plaintiffs had agreed to supply goods to the defendant's husband on credit if his wife would guarantee payment of the price, and they sent the husband a form of guaranty in order that he might obtain his wife's signature to it, leaving the matter entirely to him. The husband obtained his wife's signature to the guaranty, but gave her no sufficient explanation as to the nature and effect of the document, and she signed it without any independent advice and without understanding it when she signed it. Goods were supplied on the faith of the guaranty and the price had not been paid. Ridley, J., who tried the action, being satisfied on the evidence that the defendant did not understand the nature of the document when she signed it, gave judgment for the defendant on the authority of *Bischoffs' Trustee v. Frank*, 89 L. T. 188, and *Turnbull v. Duval*, 1902, A.C. 429, and the Court of Appeal (Williams, L.J., and Barnes, P.P.D., and Bigham, J.) affirmed his decision.

RAILWAY COMPANY—CARRIER—JUST AND REASONABLE CONDITION
—DECLARATION OF VALUE—EXTRA CHARGE FOR DOGS WORTH
MORE THAN £2.

Williams v. Midland Ry. Co. (1908) 1 K.B. 252 was an action to recover damages for the loss of a dog worth £300 entrusted to the defendants for carriage, which had been lost through the negligence of the defendants' servants. The plaintiff's agent had signed a contract note on which was indorsed a printed condition that the company was not to be liable for more than £2 for any dog, unless a higher value was declared and an extra charge paid of $1\frac{1}{4}$ per cent. on the excess of value. The defendants relied on this condition as limiting their liability for the dog in question to £2; and the Court of Appeal (Lord Halsbury, Barnes, P.P.D., and Bigham, J.) held that condition was "just and reasonable" within an act authorizing railway companies to make such conditions, and therefore reversed the judgment of Walton, J., in favour of the plaintiffs for £300.

BILL OF EXCHANGE—INDORSEMENT BY WAY OF SECURITY—BILL
NOT COMPLETE OR REGULAR ON ITS FACE—RIGHT OF PRIOR IN-
DORSER TO SUE SUBSEQUENT INDORSER.

In *Glenie v. Bruce Smith* (1908) 1 K.B. 263 the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have affirmed the judgment of Lawrance, J. (1907) 2 K.B. 507 (noted ante, vol. 43, p. 731). Glenie the plaintiff had sold pigs to one Tucker, the payment of which Bruce Smith agreed to guarantee. For this purpose Tucker accepted the bill of exchange now sued on, and Bruce Smith indorsed it, and in this state the bill was handed to the plaintiff who filled in his own name as payee and signed it as drawer, and then indorsed it. Lawrance, J., held that notwithstanding the form of the instrument in which the plaintiff appeared to be the drawer and a prior indorser, he was entitled to recover against the subsequent indorser, who would have no remedy over against the plaintiff either as drawer or indorser, because the plaintiff must, in the circumstances, be presumed to have indorsed without value, and the plaintiff was holder in due course.

SALE OF GOODS—CONTRACT TO INSURE AGAINST "ALL RISKS"—
POLICY EXEMPTING THE INSURER FROM LIABILITY FOR "CAP-
TURE, SEIZURE, OR DETENTION"—LIABILITY OF SELLER.

In *Yuill v. Scott* (1908) 1 K.B. 270, the Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L.JJ.) have

affirmed the decision of Channell, J. (1907) 1 K.B. 685 (noted ante, vol. 43, p. 402). The point decided being shortly this, that where a vendor of cattle contracted to insure them against "all risks," (the cattle being purchased in Buenos Ayres for shipment to Durban in South Africa) the contract was not fulfilled by the vendors procuring an "all risks" Lloyd policy, whereby the insurers were exempted from liability for loss by "capture, seizure and detention." On the cattle in question arriving at Durban, the authorities forbade them being landed, disease having broken out amongst them on the voyage, and they were consequently slaughtered and the purchaser suffered loss, which the insurers refused to pay, as not being covered by the policy. In these circumstances the sellers were held liable.

PRACTICE—NEW TRIAL—TIME FOR MOVING FOR A NEW TRIAL.

Greene v. Croome (1908) 1 K.B. 277 was an application for a new trial. The case had been tried by a jury who answered certain questions submitted to them and were discharged. The judge then referred the question of the amount due to the plaintiff upon the findings of the jury to be ascertained by a referee. Upon further consideration the judge gave judgment for a certain amount. Four days after this judgment, but a year after the verdict the defendants gave notice of motion for a new trial, but the Court of Appeal (Williams, L.J., and Barnes, P.P.D.) held that it was too late and that the time for moving for a new trial began to run from the date of the verdict.

**CONTRACT—CONSIDERATION—BREACH OF DUTY TO TAKE CARE—
OFFER OF NEWSPAPER TO GIVE ADVICE—DAMAGES—REMOTE-
NESS—FRAUD OF THIRD PARTY.**

In *De la Bere v. Pearson* (1908) 1 K.B. 280, the Court of Appeal (Williams, L.J., Barnes, P.P.D., and Bigham, J.) have affirmed the judgment of Lord Alverstone, C.J. (1907) 1 K.B. 483 (noted ante, vol. 43, p. 363). The case, it may be remembered, arose out of an offer on the part of a newspaper to give financial advice to its correspondents. The plaintiff, accordingly wrote to the editor asking advice as to the investment of £800, and the editor recommended a stock broker who was an undischarged bankrupt, to whom the plaintiff entrusted £1,300

for investment, which the broker fraudulently appropriated to his own use. Lord Alverstone, C.J., held that the proprietor of the newspaper was liable for the full amount of the loss, and that the damage was not too remote. The majority of the Court of Appeal, Williams, L.J., and Barnes, P.P.D., agreed with this decision, but Bigham, J., doubted whether the defendants were liable for more than the £800, the amount originally named by the plaintiff in his letter to the editor.

**BANKER—CHEQUE—COUNTERMAND OF CHEQUE BY TELEGRAM—
NOTICE OF COUNTERMAND—ACTION FOR MONEY HAD AND RE-
CEIVED—BILLS OF EXCHANGE ACT 1882 (45-46 VICT. c. 61)
s. 75(1)—(R.S.C. c. 119, s. 167.)**

Curtice v. London City and M. Bank (1908) 1 K.B. 293 was an action by a customer of the defendant bank to recover the amount of a cheque which had been paid by the defendants after they had notice as alleged of the plaintiff's countermand of payment. The cheque in question was for £63, and was drawn on October 31, 1906. On the same day after business hours the plaintiff telegraphed to the defendants countermanding its payment. The telegram was delivered on the evening of the same day by the post office, and it being after office hours was placed in the letter box of the bank. By an oversight on the part of the defendants' servants this telegram was not brought to the notice of the defendants' manager till the 2nd of November. On November 1, the cheque was presented and paid. Judgment was given in the County Court in favour of the plaintiff, but on appeal to a Divisional Court (Darling and Lawrance, JJ.) the Court was divided in opinion and the appeal was dismissed. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) were unanimous that the countermand, not having in fact come to the knowledge of the defendants before the cheque was paid, was not a sufficient countermand within s. 75(1) of the Bill of Exchange Act (R.S.C. c. 119, s. 167); and though the defendants might be liable for negligence in not having received the telegram, still the measure of damages for that neglect would not necessarily be the same as in an action for money had and received. Cozens-Hardy, M.R., said: "A telegram may reasonably and in the ordinary course of business be acted upon by the bank at least to the extent of postponing the honouring of the

cheque until further inquiry can be made. But I am not satisfied that the bank is bound, as a matter of law, to accept an unauthenticated telegram as sufficient authority for the serious step of refusing to pay a cheque."

SHIP—CONTRACT OF CARRIAGE—CONSTRUCTION—UNSEAWORTHINESS—EXCEPTION.

Nelson v. Nelson (1908) A.C. 16. In this case the House of Lords (Lord Loreburn, L.C., and Lords Halsbury, Macnaghten, and Atkinson) have affirmed the judgment of the Court of Appeal (1907) 1 K.B. 769 (noted ante, vol. 43, p. 774) on the ground that the agreement being ill-expressed, and self-contradictory, it could not displace the prima facie liability of the ship-owners to provide a seaworthy ship, and to take reasonable care; and the damage in question having resulted from the unseaworthiness of the ship, the defendants were liable therefor, there being no clear and express exemption from such liability.

DAMAGE—SUBSIDENCE—MEASURE OF DAMAGES—RISK OF FUTURE SUBSIDENCE—REMOTENESS.

In *West Leigh Colliery Co. v. Tunncliffe* (1907) A.C. 27, it may be remembered that the Court of Appeal (reversing Eady, J.), held, that in assessing damages recoverable by a surface owner for subsidence owing to the working of minerals under or adjoining his property, it was proper to allow for the depreciation of the market value of the property owing to the risk of future subsidence (1906) 2 Ch. 22, (noted ante, vol. 42, p. 598). The House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, Ashbourne, Hereford and Atkinson) have now reversed the decision of the Court of Appeal and restored that of Eady, J., (1905) 2 Ch. 390 (noted ante, vol. 42, p. 101). Their Lordships were of the opinion that the case was governed by the decisions of the House of Lords in *Backhouse v. Bonomi*, 9 H.L.C. 503, and *Darby Main Colliery Co. v. Mitchell*, 11 App. Cas. 127.

SALE OF GOODS—SHIP—PASSING OF PROPERTY IN GOODS—SALE OF GOODS ACT, 1893 (56-67 VICT. c. 71) SS. 16, 18, 62.

Laing v. Barclay (1908) A.C. 35, although an appeal from a Scotch Court deserves attention, because it deals with a point

of law arising under the Sales of Goods Act 1893 (56 & 57 Vict, c. 71), which, as has been said before, is mainly declaratory of the common law. The respondents, Barclay & Co., agreed to build two ships for an Italian firm, according to specifications, and under the superintendence of an agent appointed by the Italian firm, for a certain price, payable by instalments, some of which were to be paid during the progress of construction, but delivery of the ships was not to be considered to be completed till they had passed trials at Greenock, and off the Italian coast. Before the ships were fully completed, but after several instalments of purchase money had been paid, the vessels were seized in Scotland at the instance of creditors of the Italian firm, but, on the application of the builders, the Scotch Court of Session recalled the arrest. The House of Lords (Lord Loreburn, L.C., and Lords Halsbury, Macnaghten, Hereford, Robinson and Atkinson) affirmed this decision on the ground that under the contract the property in the ships was not intended to pass until the ships had been completed and passed the specified trials.

BRITISH NORTH AMERICA ACT, s. 91(29); s. 92(10)—DOMINION RAILWAY ACT 1888, ss. 187, 188, INTRA VIRES—R.S.C. 1886, c. 1, s. 7(2)—“PERSON.”

Toronto v. Canadian Pacific Ry. (1908) A.C. 54 was an appeal by the City of Toronto from a judgment of the Court of Appeal for Ontario, whereby it was determined that the city was bound to pay the amount apportioned by the Railway Committee under ss. 187 and 188 of the Dominion Railway Act 1888, as its share of the cost of the protection of the public in traversing certain level crossings of the Canadian Pacific Railway at points within the city limits. On behalf of the city it was contended that the Dominion Parliament had no power to enact any legislation which would have the effect of imposing any pecuniary charge upon the city because it was not subject to the legislative jurisdiction. It was conceded that the defendant railway was a work within the jurisdiction of the Dominion Parliament, but it was claimed that the city was subject to Provincial legislation, and could only be authorized, or required to spend money by the Provincial Legislature. Counsel for the city also urged that the city was not “a person” interested within the meaning of section 188. The Judicial Committee (Lords Robertson and Collins, and Sir A. Wilson and Sir A.

Wills), it is not very surprising to find, overruled all these contentions, and adhered to the fairly well established rule that in matters within the jurisdiction of the Dominion Parliament it has the amplest legislative power, and for the purpose of effectively legislating it may if need be deal with matters that otherwise are within Provincial control, and as to such matters though the Provincial and Dominion legislation may overlap, yet in case of conflict the Dominion legislation must prevail.

REGISTRY ACT (R.S.O. 1897 c. 136) s. 87—STATUTE OF LIMITATIONS (R.S.O. 1897, c. 133) ss. 4, 22—UNREGISTERED CONVEYANCE—SUBSEQUENT MORTGAGE—PRIORITY.

McVity v. Tranouth (1907) A.C. 60 is an appeal from the Supreme Court of Canada, on a point arising on the Registry Act of Ontario. It is not often that we find it proper to find fault with the conclusions reached by the Judicial Committee of the Privy Council, but in this case, with the greatest respect for that tribunal we humbly conceive the conclusion it has reached in this case can hardly be said to be satisfactory. The case arose out of the fraud of an unprofessional conveyancer, and is one of those unhappy ones in which Courts of law are called on to say on which of two innocent persons the loss is to fall. The facts of the case were comparatively simple. In June, 1891, Mrs. Tranouth (then Maxfield) being about to marry, and being owner of the land in question, wished to have it vested in herself and intended husband, so she applied to one Sootheran, who turned out to be a rogue, to do the necessary conveyancing, and he thereupon drew a conveyance to himself, and a reconveyance from himself to Mrs. Tranouth and her husband. He registered the deed to himself, but did not register the reconveyance, but led the grantees to suppose it was registered by indorsing a forged certificate of registration thereon. A few days intervened between the date of the reconveyance and the marriage, and thereafter Mrs. Tranouth and her husband had continuously occupied the premises. In 1895, Sootheran, assuming to be owner, executed a mortgage to the plaintiff *McVity*, for \$2,000, which was registered August 30, 1895. The action was commenced by the mortgagee in May, 1903. From the report we gather that *McVity* had actual notice of the possession of the *Tranouths* before advancing his money, and took his security with the knowledge that a third person was in adverse possession of the mortgaged premises. This was an

act of such gross carelessness that it might not unreasonably have been thought to preclude him from the benefit of the Registry Act. The Court of Appeal for Ontario held that the Tranouths were entitled to the benefit of the Statute of Limitation from the year 1895, and that they had acquired title by possession as against McVity; the Supreme Court of Canada affirmed this decision; but the Judicial Committee (Lord Loreburn, L.C., and Lords Macnaghten, Atkinson and Collins, and Sir A. Wilson) have now reversed that decision. The short ground on which their Lordships proceed is, that the conveyance to the Tranouths though liable to be defeated by a subsequent prior registered instrument, was, nevertheless, valid as between Sootheran and the Tranouths; the latter, consequently, were rightfully in possession and no action could be brought against them, and therefore the Statute of Limitations did not begin to run in their favour until the execution of the mortgage; therefore, as against the mortgagee, they could not set up their possession prior to the mortgage as an adverse possession under the Statute. If this be a sound position, then it seems to follow that if the Tranouths had been in actual occupation 50 years before the execution of the mortgage it would still have been open for Sootheran or someone claiming under him to execute a mortgage which would have the effect of gaining priority over the Tranouths' unregistered deed, and their possession would avail nothing, even though the mortgagee had actual notice of their prior 50 years' possession; a decision which involves such a ridiculous result, may be law, but it can hardly be said to have much common sense in it, and the case would seem to make it plain that some amendment in the Statute of Limitations or Registry Act is urgently needed.

ALGOMA—SALE FOR TAXES—TAX PURCHASER—R.S.O. c. 26, ss. 23, 29—TAX DEED—PRIOR REGISTRATION OF DEED FROM DEFAULTING OWNER—R.S.O. 1887, c. 193, s. 184.

McConnell v. Beatty (1908) A.C. 82 was an appeal from the Court of Appeal for Ontario. The case arose out of a sale of mining land for arrears of taxes. At the time of the sale W. H. Beatty was the owner, and one Bull became the purchaser and obtained a certificate as purchaser; his tax deed was dated December 14, 1903, and he subsequently conveyed to McConnell, January 12, 1904; both these deeds were registered. After the

sale W. H. Beatty conveyed the lands to his brother, J. W. Beatty, on October 29, 1903, which was registered prior to the tax deed, and the deed to McConnell. J. W. Beatty, the plaintiff, claimed to have acquired priority over the tax purchaser and his grantee, (1) On the ground of an alleged purchase by W. H. Beatty of Bull's right as tax purchaser, and (2) the prior registration of the deed from W. H. Beatty to the plaintiff. The Court of Appeal came to the conclusion that there was some evidence of a purchase by W. H. Beatty of Bull's interest, or a redemption by him, and that at the time the deed was made to Bull he was not the holder of, or entitled to the certificate of purchase which was then in W. H. Beatty's possession. On this point the Judicial Committee (Lords Robertson and Collins and Sir A. Wilson, Sir H. E. Taschereau and Sir A. Wills) were unable to agree with the Court of Appeal and were of the opinion that there was no sufficient evidence of any purchase by W. H. Beatty of Bull's interest as tax purchaser, or of any redemption of the land by W. H. Beatty; and on the second point they came to the conclusion that J. W. Beatty was not a purchaser for value but a mere volunteer and therefore the prior registration of his deed gave him no priority over the tax deed.

**TAXATION—EXCAVATION—BUSINESS CARRIED ON FROM PONTOONS
FLOATING OVER EXCAVATION.**

Smith's Dock v. Tynemouth (1908) 1 K.B. 315 may be here briefly noted. The plaintiffs were owners of a dock on a tidal river, and for the purpose of their business made an excavation on their premises into which the waters of the river flowed, and over which excavation pontoons were placed and attached to piles driven into the excavation, and from which pontoons an important part of their business of ship repairing was done. On a stated case, Channell and Bray, JJ., held that the place so excavated remained assessable for the purpose of taxation as "land covered by water."

 REPORTS AND NOTES OF CASES.

 Province of Ontario.

 HIGH COURT OF JUSTICE.

Falconbridge, C.J.K.B., Britton, J., Clute, J.]

[Feb. 5.

KINZIE v. HARPER.

Bills of exchange—Cheque—Consideration—Part payment under unenforceable contract—Statute of Frauds.

A definite oral bargain (good except for the Statute of Frauds) for the sale by the plaintiff to the defendant of an ascertainable and definite parcel of land is a sufficient consideration for a cheque drawn by the defendant upon a bank in favour of the plaintiff for a part of the purchase money; and, the cheque being dishonoured, the plaintiff was held entitled to recover the amount thereof from the defendant, the latter not being in possession, and the plaintiff not having made or tendered a conveyance, but being able and willing to perform his contract.

Judgment of the 4th Division Court, County of Waterloo, reversed.

Clement, K.C., for plaintiff, appellant. *Middleton*, K.C., for defendant, respondent.

NOTE.—See *Collins v. Smith*, ante, infra, p, 163.

 Meredith, C.J.C.P., Magee, J., Mabey, J.]

[Feb. 26.

WILLIAMS v. PICKARD.

Water and water-courses—Land bordering on river—Crown grant—Description—Construction—Ownership ad medium filum—Navigable or unnavigable stream—Alluvium—Bed of stream.

Lot 5 in the front concession of Howard was described in the grant from the Crown issued July 8, 1799, as follows: "Beginning at a post marked 4/5 on the bank of the River Thames; then south 45 degrees, east 68 chains; then north-easterly, par-

allel to the said river, 30 chains; then north 45 degrees west to the said river; then along the bank with the stream to the place of beginning":—

Held, MAGEE, J., dubitante, that having regard to section 31 of the Surveys Act, R.S.O. 1897, c. 181, the river formed the northerly boundary, and the lot did not extend usque ad filum aquæ. *Robertson v. Watson* (1874), 27 C.P. 579, 599, followed.

The question whether the river at and above and below the locus in quo was navigable or unnavigable need not be determined, in view of the decision of the Court of Appeal in *Kewatin Power Co. v. Kenora* (1908), 11 O.L.R. 266.

The plaintiff claimed, as part of lot 5, a bar or deposit of gravel and sand below the bank of the river. This sandbar as to vegetation retained the characteristics of a bed of the stream. For the greater part of the year it was covered with water, and during the remainder was frequently under water, while at times of freshets the water covered it to a depth of 25 or 30 feet, and sometimes overflowed the bank, which was of at least that height.

Held, that the bar had not become land formed by alluvium, but still formed part of the bed of the river. *Hindson v. Ashby* (1896), 1 Ch. 78 (1896), 2 Ch. 1, followed.

Judgment of CLUTE, J., reversed.

Matthew Wilson, K.C., for defendants, appellants. *A. H. Clarke*, K.C., and *D. H. Smith*, for plaintiff.

Falconbridge, C.J.K.B., Britton, J., Riddell, J.] [March 5.

ROBINSON v. MORRIS.

Security for costs—Action against constable for arrest of plaintiff—Defence on merits—Affidavit—Insufficiency—Grounds—Belief—Rule 518—Agent—Solicitor.

The provisions of R.S.O. 1897, c. 89, requiring plaintiffs in actions against justices of the peace and other officers fulfilling public duties, to give security for costs, in certain circumstances, must be followed with some approach to strictness, the right given being a variation from the usual course of litigation. The affidavit filed on behalf of the defendant, a constable, in an action brought against him for the arrest of the plaintiff, in support of a motion for an order for security for costs under the Act referred to, did not, in the part indicating the nature of

the defence, shew the grounds for the belief of the deponent in the truth of the statement made, as required by Con. Rule 518, where facts are stated not within the knowledge of the deponent; and did not in terms state that the defendant had a good defence on the merits, nor set out the facts justifying the conclusion that the defendant had such defence or that the grounds of action were trivial or frivolous.

Held, 1. The affidavit was insufficient, and the motion should be dismissed, but, as it appeared that the defendant acted as an officer of the law, the dismissal should not preclude an application upon better material, on payment of costs.

2. The solicitor for the defendant was an "agent" within the meaning of the statute, and might make the affidavit.

Decisions of CLUTE, J., and the Master in Chambers reversed.
J. B. Mackenzie, for plaintiff. Monahan, for defendant.

Falconbridge, C.J.K.B., Britton, J., Riddell, J.] [March 9.

STANDARD BANK v. STEPHENS.

Promissory note—Subscription for share in company—Fraud—Note of subscriber transferred to bank—Holders in due course—Hypothecation of securities—Powers of company—By-law—Resolution—Indorsement by secretary—Negotiation of note.

The defendant was induced to subscribe for one share of the stock of an incorporated manufacturing company, and to give a promissory note for the amount of the par value thereof, by a false and fraudulent representation made by an agent of the company. The note shewed on its face that it was given for a share in the company, and it was indorsed to the order of the plaintiffs, a chartered bank, by an indorsement in the name of the company, with the name of the secretary thereof signed thereto. A by-law was passed by the directors of the company, and confirmed by the shareholders at an annual meeting, authorizing the borrowing of money, following the words of section 49 of R.S.O. (1897) c. 191. It was also resolved by the directors, and confirmed by the shareholders, that an account be opened with the plaintiffs; that all moneys, orders, and other securities belonging to the company and usually deposited in the ordinary course of banking, be deposited in said bank account; that the same might be withdrawn therefrom by cheque,

bill, or acceptance in the name of the company, over the names of any two of four specified officers (one being the secretary); and that for all purposes connected with the making of deposits in the bank account, the signature of any one of the four should be sufficient. By a memorandum over the seal of the company and the hands of three of the officers, it was agreed that the plaintiffs should hold all the company's securities at any time in the plaintiffs' possession as collateral security for present and future indebtedness; and it appeared that the note above referred to, upon which this action was brought, with a large number of others, was delivered to the plaintiffs as a collateral security, accordingly. The secretary was also a director of the company, and indorsed notes, as he indorsed that in question, almost daily, with the knowledge of his co-directors, for a year and a half.

Held, that the by-law was sufficient to authorize the hypothecation of the company's securities to secure the present and future indebtedness of the company to the plaintiffs; that the indorsement over the signature of the secretary was sufficient to pass the property in the note to the plaintiffs; that the plaintiffs were entitled to assume that a share had been properly allotted to the defendant, and that the note represented the debt due by him to the company for such share, and that the company had the right to negotiate it; and (upon the evidence) that the plaintiffs were holders in due course, for value, without notice of the fraud, and were entitled to recover.

Judgment of MACBETH, Co.J., affirmed.

T. G. Meredith, K.C., for defendant. *G. S. Gibbons*, for plaintiffs.

Province of Manitoba.

COURT OF APPEAL.

Full Court.]

GORDON v. LEARY.

[Feb. 11.]

Principal and agent—Undisclosed principal.

Appeal from judgment of DUBUC, C.J., noted vol. 43, p. 586, allowed with costs and action dismissed with costs on the ground that the learned judge erred in drawing the inference from the undisputed facts that the defendant had undertaken

to carry on the business formerly carried in his son's name. The defendant was the principal creditor of J. G. Leary & Co., and although Schofield was put in charge of the business with the consent of father and son and apparently for the defendant's protection, there was no evidence warranting the holding that the business was in fact transferred to the defendant as his business, and the account with the plaintiffs was continued in the name of J. G. Leary & Co., the defendant not having been asked by the plaintiff whether he was the proprietor or not.

Fullerton, for plaintiff. *Elliott and McNeil*, for defendants.

Full Court.]

REX v. CHONEY.

[Feb. 17.]

Criminal law—Confession obtained by trick—Conversation with person who represents himself as having been sent by prisoner's counsel, admissibility of—Evidence of detectives who overhear such conversation—Evidence.

The prisoner was in jail awaiting his trial for murder. While there another prisoner, L., who spoke his language, was employed several times by prisoner's counsel as interpreter at conferences between them. Afterwards a constable arranged an interview between L. and the prisoner in a cell outside of which two detectives were concealed in such a manner that they could overhear the conversation. The trial judge found, as a fact, that L. falsely stated to the prisoner that his counsel had requested him to get all the facts from the prisoner to enable counsel to properly conduct the defence. The prisoner then made certain statements to L. in the Ruthenian language. These were overheard by the detectives who also understood that language. The trial judge refused to admit evidence of such statements. On a reserved case stated for the opinion of the Court,

Held, that the prisoner's conversation with L., whom he reasonably supposed to be his counsel's agent, was privileged; and, as the whole matter was the carrying out of one fraudulent design, the conversation should be treated as if it was with all the three witnesses, and so the evidence of the two detectives should also be excluded.

It having been admitted by counsel for the Crown that, under the facts as found by the trial judge, the conversation with L. was privileged, the interview should be treated as one with several persons who had fraudulently adopted the character of

the counsel's representatives, and the cloak of privilege should be applied to what was heard by the witnesses without, as well as within, the cell.

J. Hillyard Leech, for the Crown. *Blackwood*, for the prisoner.

Full Court.]

RE DUPUIS.

[Feb. 17.]

Municipality—By-law—Retroactive legislation.

The Town of St. Boniface passed a by-law providing that no stable should be built and maintained at less than twenty feet from any house without the permission of the owner, and all stables built and in use at the date of the passing of the by-law, which did not conform to that standard, were declared to be a nuisance, and, as such, subject to abatement. Dupuis was convicted, under the by-law, for maintaining a stable which had been erected and used before the passing of the by-law.

Held, that the municipality had no power to pass a by-law having a retroactive effect, and that the conviction must be quashed.

A. Dubuc, for applicant. *Knott*, for Town of St. Boniface.

Full Court.]

SMYTHE v. MILLS.

[Feb. 25.]

Pleading—Demurrer—Action of deceit—Misrepresentation as to something that would take place in the future not sufficient to found action.

Action to recover damages for deceit. The statement of claim alleged that, during negotiations with the defendant for a lease of a store owned by the latter, he represented that the store would be vacant on October 31, 1905, that on the faith of such representation the plaintiff agreed to rent the store from November 1, 1905, purchased a stock of goods and expended other moneys in preparation for the intended business, and that it subsequently transpired that defendant had granted a lease of the store to another person for a year, which would not expire until June 1, 1906, and that plaintiff was, consequently, unable to occupy the store as agreed. On appeal from the judgment of HOWELL, C.J., on a demurrer to the statement of claim,

Held, that it should have specifically alleged the concealment of the lease as the ground of action, the representation as

to what would take place in the future not being a ground for an action of deceit. Leave to amend given on payment of the costs of the appeal and costs up to the hearing to be costs to defendant in any event in case plaintiff amended.

Knott, for plaintiff. *Burbidge*, for defendant.

Full Court.]

[Feb. 29.

CANADIAN NORTHERN RY. CO. v. ROBINSON.

Compulsory taking of land—Appeal from award of arbitrators—Interest on amount awarded.

Held, 1. Upon an appeal under section 209 of the Railway Act, R.S.C. 1906, c. 37, from an award of arbitrators determining the compensation to be paid to an owner for the compulsory taking of his lands by a railway company, the Court will not assume the function of the arbitrators and make an independent award, but will rather treat the matter as it would an appeal from the decision or verdict of a judge, and the award will not be disturbed, unless the arbitrators manifestly erred in some principle in arriving at their conclusion.

2. Interest on the amount awarded should not be added by the arbitrators, especially in a case where the claimant remains in possession of the property until after the date of the award.

3. It is proper that the claimant should be allowed the actual value of the property to him, and not merely the market value as on a sale.

4. The arbitrators are not bound to allow ten per cent. extra on the amount of the compensation for the compulsory taking, although that is frequently done, and the Court will not interfere with their refusal to allow such percentage.

Munson, K.C., and *Clark*, K.C., for the company. *Pitblado*, and *A. B. Hudson*, for Robinson.

Full Court.]

SIMON v. SINCLAIR.

[Feb. 29.

Estoppel—Forgery—Failure to defend action on prior note forged by same person.

Held, on appeal from *PERDUE*, J., that a person whose indorsement on a promissory note has been forged is not estopped from denying his signature by the fact that he had allowed judgment to go against him by default in a previous action by

the same plaintiff on an indorsement of his name on a prior note forged by the same person, although the forger negotiated the second note after such judgment. *Morris v. Bethell*, L.R. 5 C.P., followed. *Mackenzie v. British Linen Co.*, 6 A.C. 82, distinguished.

If there were any estoppel in this case, it would be only one arising from negligence in not anticipating that there might be subsequent similar forgeries, and warning the plaintiff by telling him of the first forgery. But mere negligence, to amount to an estoppel, must occur in the transaction in question: *Arnold v. The Cheque Bank*, 1 C.P.D. 578; *Everett and Strode on Estoppel*, 2nd ed. 343.

Wilson and Affleck, for plaintiff. *Fullerton*, for defendant.

KING'S BENCH.

Mathers, J.] MONTGOMERY v. MITCHELL. [Feb. 3.

Company—Lien on shares for debt due to company—Power to make by-law providing for lien—Estoppel—Waiver of lien.

This was an interpleader application in which the contest was as to the right of a company incorporated under the Manitoba Joint Stock Companies Act, to assert a lien upon the shares of one of its stockholders for an amount due to the company for unpaid calls on the shares as against an execution creditor, under whose execution the sheriff had seized the shares.

Held, 1. The company was entitled to such lien under the terms of its by-laws which provided for such a lien in sufficiently clear terms.

2. The company had power to pass such by-laws under section 31 of the Manitoba Joint Stock Companies Act, by virtue of the expression, "the conduct in all other particulars of the affairs of the company."

Child v. Hudson Bay Co., 2 P. Wms. 207, and *Société Canadienne Française, etc. v. Daveluy*, 20 S.C.R. 499, followed.

As, however, the public are not charged with notice of the company's by-laws in this Province, such a by-law would not protect the company against a bona fide purchaser of shares without notice.

The shares in question stood in the name of the defendant's wife, but the plaintiff on the first day of May, 1907, recovered

a judgment against the defendant, his wife and the company declaring that the said shares were the absolute property of the defendant Mitchell, and available under execution in satisfaction of the plaintiff's judgment. At that time a note given to the company for the balance due on the shares was held by the bank in which it had been discounted; but, before the time of the seizure of the shares by the sheriff, that note had fallen due and had been taken up by the company.

Held, 1. At the time of the recovery of the last mentioned judgment, there was no debt due from Mitchell or his wife to the company for which the company could then have set up a lien, and it was not estopped by the judgment from setting up the lien as soon as it had taken up the note.

2. The right to the lien had not been waived or lost by the taking and discounting of a promissory note for the debt for which the lien was claimed.

Whilst such would be the result in the case of a mechanic's lien, the analogy is not complete. In the one case the lien is a statutory right for the protection of a particular debt and, if this is once discharged, the lien is gone. In the other case the lien is a continuing one for every debt that may arise and, the moment there is a debt or liability due by the shareholder, the lien at once attaches.

Burbidge, for plaintiff. *Baker*, for claimant.

Macdonald, J.]

[Feb. 10.

RE JONES & MOORE ELECTRICAL COMPANY.

Company—Contributories—Agreement with company after subscription for shares.

This was an application to add, as contributories in the winding-up of the company, John Wesley Jones and Frank L. Moore in respect of their written agreement to take and pay for, each, two hundred shares of the capital stock of the company of one hundred dollars each. Jones and Moore resisted the application on the ground that the company had afterwards entered into an agreement in writing with them, whereby the company were to issue to them fully paid-up and non-assessable shares, being the shares for which they had already subscribed, in consideration of their assigning to the company all their rights, title and interest in a business acquired by the company from another company controlled by them, and certain patent rights

and good will, and of their covenants to furnish to the company certain chattel property to the value of \$6,500, and to secure to the company all the business formerly carried on in the west by said other company, together with other benefits and advantages. The agreement under which Jones and Moore subscribed for the shares was separate and distinct from the other agreement, and was not in any way conditional upon the terms of the latter.

Held, that Jones and Moore must pay in cash for the shares subscribed for by them.

In re Hayford Company, Pells' case, L.R. 8 Eq. 222, distinguished because Pells' application for the shares in that case was contemporaneous with and founded upon an agreement of the company to take certain good will and stock-in-trade in payment for the shares.

Held, also, that Jones and Moore were not entitled to any credit for the goods supplied by them to the company under the special agreement referred to because that agreement was ultra vires of the company, and if payments on subscribed shares are not made in cash, they must be made in kind by the transfer in presenti of property or the rendering in presenti of services. *Drummond's case*, 4 Ch. 722, followed.

Minty, for creditors. *Wilson and Cameron*, for liquidator. *Anderson and Fullerton*, for Jones and Moore.

Bench and Bar.

THE LATE HON. A. C. KILLAM.

The profession of the Province of Manitoba have worthily referred to the death of the Chief Commissioner of the Board of Railway Commissioners.

The Benchers of the Law Society, in special meeting assembled, passed a resolution placing on record their sense of the loss sustained by the country in his death, and desiring to join with his many friends and associates in expressing their sorrow and regret at the unexpected and sudden close of such a distinguished and useful career.

A resolution was also passed by the judges of the Courts of Appeal and King's Bench for Manitoba to the same effect. Amongst other expressions of appreciation of his high character, intellectual capacity and learning said:—"Upon the bench

he proved himself to be an erudite and painstaking judge, whose decisions commended themselves to his brother judges and to the members of the legal profession as models of clear and learned judicial reasoning. His work upon the Board of Railway Commissioners may be characterized as one of national importance. His work in his latest capacity was one of the utmost utility to the public. It will remain a monument to his memory and a model for the future."

Chief Justice Howell at the opening of the spring assizes also took occasion to refer in most appreciative terms to the deceased, and concluded as follows:—"What an example for young men just commencing a professional career. Killam, the friend, the lawyer, the citizen, the judge, the chief justice, the railway commissioner, is gone. Let us hope that the night of death has been followed by a glorious morning."

United States Decisions.

DEATH—Compensation.—Where there was evidence that plaintiff was in normal health at the time of an accident, it is not error to charge that the jury should not consider any previous illness from which she had recovered in determining her compensation. *Jacksonville Electric Co. v. Batchis*, Fla., 44 So. Rep. 933.

FORGERY—What constitutes.—To constitute forgery, the false instrument must be one which if genuine would have legal validity; hence, if an instrument be such that, though falsely made, it shews on the face of it that it has no legal validity, it is not the subject of forgery. *Ex parte Farrell*, Mont., 92 Pac. Rep. 785.

HIGHWAYS—Dedication.—Where one who moves his fence back intends to dedicate the space set free to the public, the fact that his motive was to oblige a friend is immaterial. *Tise v. Whitaker-Harvey Co.*, N.C. 59 S.E. Rep. 1012.

HOMICIDE—Self-Defence.—The aggressor not reasonably free from fault cannot excuse the killing of his antagonist on the ground of self-defence, unless he in good faith declined the combat and his adversary became the aggressor. *King v. State*, Fla., 44 So. Rep. 941.

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CONFLICT OF CONTROL OF CORPORATIONS.

Centralization is the modern trend of affairs. In the United States the centralization of business in huge corporations is being followed by the same course in affairs of government. The Federal government is encroaching constantly on the jurisdiction of the states. This is being accomplished on the one hand by Congress, supported by the Supreme Court, and on the other by an aggressive executive.

At the outset the Federal government, in order to support its natural dignity and to detract from the importance of the government of the several states in the eyes of their respective citizens, followed the course of maintaining its own dignity to the utmost and insisting on a rigid enforcement of its laws. Federal aggression was slow at first. Its own place must be made. The civil war and the period of reconstruction in the South which followed, gave the opportunity which was seized and improved upon. The universal tendency of officials of all classes to magnify their positions for the purpose of magnifying themselves was evident amongst the Federal office-holders. The distant authority, the national embodiment, raised the Federal officials above those of the state and the persistence of the Federal government in maintaining its authority belittled the concurrent authority of the state. A very striking instance is shewn in the State of Maine where prohibition prevails and even the most disreputable drinking places are licensed under Federal law. The state law may be openly defied but not the Federal. No doubt in many states the local law is upheld with vigour, but in many it is not so. This weakness of the states which was caused by Federal aggression is again sized up for further aggression.

In a speech made at Harrisburg, October 4, 1906, President Roosevelt said: "In some cases this governmental action must

be exercised by the several states individually. In yet others it has become increasingly evident that no efficient state action is possible, and that we need, through executive action, through legislation and through judicial interpretation and construction of law, to increase the power of the Federal government. If we fail thus to increase it, we shew our impotence."

Mr. Root, on December 12, 1906, at New York, remarked upon the gradual passing of control into the hands of the national government and stated that there were other projects tending more and more to obliterate state lines, and that it may be that such control would better be exercised in particular instances by the government of the states, but the people will have the control they need either from the states or from the national government, and if the states fail to furnish it in due measure, sooner or later constructions of the constitution will be found to vest the power where it will be exercised—in the national government.

The clauses of the constitution relating to interstate commerce have been construed out of their original meaning to give supreme authority to Congress in matters not contemplated by the fathers of the constitution. This construction was first asserted in the *Lottery Case* (1903) 188 U.S. 321, arising out of the enforcement of the statute of 1895, which made it illegal to transport lottery tickets from one state to another. The statute was passed to cover police regulations where the states were too corrupt or too weak to preserve their own law and order. It has been extended by the pure food laws and seems to have exhausted itself in the statute regulating the liability of employers of labour on interstate railways which was declared unconstitutional.

In the recent message of the President to Congress of March 24, 1908, he recommends the measure again, subject to the changes required to bring it within the constitution. The limit to which it may go is indicated in a letter of April 2, 1907, from Judge Edward H. Farrer, of New Orleans, to the President, wherein he shewed that a complete control of the railway sys-

tem of the United States could be accomplished by a construction of a clause of the constitution which gives to Congress power to establish post offices and post roads. A corporation or commission could be created to acquire railroads, the modern post roads, and to lease them on terms to operating corporations. Thus the Federal government could obtain complete control of all the railway systems of the United States and subject them to such regulations as the executive might see fit. It is unnecessary to comment upon the power which could, in this way, be given to the Federal government. How such measures would be brought about and carried into effect may be gathered from the following criticism of a United States district judge in the President's message of December, 1906: "I have specifically in view a recent decision of a district judge, leaving railway employers without a remedy for violation of a certain so-called labour statute. It seems an absurdity to permit a single district judge against what may be the judgment of an immense majority of his colleagues on the bench to declare a law solemnly enacted by the Congress to be unconstitutional."

In January, 1907, there was introduced into the House of Representatives a bill which provides "that whenever in his judgment the public welfare will be promoted by the retirement of any judge of the United States, the President shall, by and with the advice and consent of the Senate, nominate and appoint a suitable person possessing the qualifications required by law to the office to be vacated by such retirement . . . The reason for retirements hereunder shall be stated in making nominations." It appears that the Supreme Court, which has world-wide respect, is in the glamour of centralization and imperialism. What can be the meaning of the statements of the President and his chief secretary that if the people desire it a construction of the constitution will be procured to meet their views? The sapping of local control leads to weakness in individual action. Centralization can never add to liberty. Bureaucracy and the constant turning for government support detract from rugged self reliance.

The question of centralization must be dealt with by Canadian statesmen. Our circumstances are very similar to those of the United States. Our Federal system was largely adopted from that of our neighbours.

The limitations of the Federal and Provincial jurisdictions have been before the Judicial Committee of the Privy Council in many cases: *L'Union St. Jacques v. Belisle* (1874) L.R. 6 P.C. 31; *Dow v. Black* (1875) 6 P.C. 272; *Cushing v. Dupuy* (1880) 5 A.C. 409; *Citizens v. Parsons* (1881) 7 A.C. 96; *Russell v. Regina* (1882) 7 A.C. 829; *Hodge's Case* (1883) 9 A.C. 117; *Lambe's Case* (1887) 12 A.C. 575; *Tennant v. Union Bank* (1894) A.C. 31; *Voluntary Assignment Case* (1894) A.C. 189; *Local Prohibition Case* (1896) A.C. 348; *Brewers' License Case* (1897) A.C. 231; *Fisheries Case* (1898) A.C. 700; *Union Colliery v. Bryden* (1899) A.C. 580; *Manitoba Liquor License Act Case* (1902) A.C. 73.

The final determination of these cases was made without regard to views of centralization or localism. The Judicial Committee is not swayed by aggression and we are preserved from the result of influences which seem to be prevalent in the United States.

A similar question of far-reaching importance was recently before the Supreme Court of Canada in *Canadian Pacific Railway v. Ottawa Fire Insurance Co.* (1908) 39 Can. S.C.R. 405. Four questions were propounded by the Court as follows:

"1. Is every charter issued by virtue of provincial legislation to be read subject to a constitutional limitation that it is prohibited to the company to carry on business beyond the limits of the province within which it is incorporated?

"2. Can an insurance company incorporated by letters patent issued under the authority of a Provincial Act, carry on extra-provincial or universal insurance business, i.e., make contracts and insure property outside of the province, or make contracts within to insure property situate beyond?

"3. Has a province power to prohibit or impose conditions and restrictions upon extra-provincial insurance companies which transact business within its limits?

"4. Has Parliament authority to authorize the Governor in Council to permit a company locally incorporated to transact business throughout the Dominion or in foreign countries?

Mr. Justice Girouard declined under the circumstances to pass upon them. The opinions of a majority, Idington, Duff and Maclellan, JJ., were in favour of the provinces on the first two questions, and the Chief Justice and Sir Louis Davies contra. No opinion appears to have been expressed on the third question. On the fourth no opinion was expressed by the majority, although the minority opinion was that the Dominion Parliament has no jurisdiction over insurance companies incorporated under provincial law.

The question of the creation and control of corporations does not appear to be disposed of. It is rumoured that similar questions are to be submitted to the Supreme Court of Canada by Order in Council. The first question is raised in the *York County Loan Case*, now pending before the Ontario High Court of Justice. The attitude of the Province of Ontario may be gathered from the statute of Edward VII., which nullifies contracts made by municipalities with corporations declared to be for the general advantage of Canada or not under the control of the Provincial Legislature unless approved of by order of the Lieutenant-Governor in Council and that of the Dominion Parliament in the bill respecting co-operation, referred to hereafter, now before the Senate, having passed the House.

No doubt, by the process of litigation and final decisions of the Judicial Committee of the Privy Council, some definite settlement of these questions may be procured at the expense of private litigants, the Federal government and the provinces. This would be after the delay, uncertainty and the conflict which must be waged upon it. Notwithstanding the recent criticism in our public press of the Judicial Committee of the Privy Council, it is well for the Dominion and its provinces that there is such a body to stand between centralization and localism. Although this is so there appears to be no good reason why all these questions should not be arranged by conferences of the

Dominion and the provinces and disposed of by an amendment of the British North America Act.

Both the provinces and the Dominion must make concessions and recede from their present attitude. On the one hand the Dominion should not unnecessarily declare undertakings to be for the general advantage of Canada or authorize companies to carry on business through Canada and elsewhere, and on the other, the provinces should not restrict Dominion corporations which are clearly within Dominion authority.

The largest question at present to be disposed of is that of rates of public utility companies. Such companies are first such as carry on business in more than one province. The right to incorporate and control them need not be discussed. This can be done only by the Federal Government. There is no means by which the Province of Ontario can control a freight rate from Toronto to Halifax. The provinces must concede very much which may, unquestionably, be within their jurisdiction in respect to such undertakings. An electric railway incorporated by a province and in many respects a purely local concern may exchange traffic with a railway which is without doubt beyond provincial control. For the advantage which would be gained by the people of the provinces in fixing rates, a large measure of control should be given to the Federal government. There are phases of control such as indicated which can be disposed to greater advantage to the public by Federal law, and there are others which, for what may be called Dominion undertakings, may be more readily disposed of by the provinces. Let it be conceded that in some respects and for some purposes provincial undertakings are better under Dominion supervision, and in others Dominion undertakings better under that of the provinces. The limits of concession on either hand may be readily determined when the principle of the decision of control is decided upon. Whether a railway runs to the frontier or whether it crosses a railway declared to be for the general advantage of Canada, should not decide the question. It is whether the undertaking is in its workings a part of one for the general advantage of Canada.

Public utility companies of the minor class wholly within the province should be subject to provincial control alone. What they are is a question of the general construction of their objects. The construction and operation of an electric railroad from Toronto to Hamilton or from Toronto to Newmarket may be without doubt for the general advantage of Canada, because on its line freight may be consigned to any place in another province. But it is difficult to see how a power line from Toronto to Niagara Falls can by any method of construction be held to be for the general advantage of Canada. By no possible means can it affect the interests of the inhabitants of another province, and it is difficult to see that because this line may transmit power to the State of New York it is so. For the purpose of control, electricity is a commodity of commerce and the product of the power plant could be treated as any other commodity. The limit of absurdity appears to have been reached when promoters suggested that the right to transmit power from Isle Royal should be included in the objects of a local concern at Port Arthur in order that the undertaking might be declared to be for the general advantage of Canada.

Similar disorder obtains in the creation and control of private corporations. In the case above referred to it was contended on behalf of the Minister of Justice that section 92(11) of the British North America Act, "The incorporation of companies with provincial objects," limited the objects of provincially incorporated companies to the incorporating province. Sir Louis Davies in his judgment does not go this far. At page 431, he says:—"It by no means follows from this, however, that everything the company does beyond the area of the province within which it is limited to do business in furtherance of or ancillary or incidental to its main objects or purposes is necessarily ultra vires," and he instances a manufacturing company which may go beyond the province to purchase its raw material or machinery. It would be a most difficult question to determine in many cases what is the main and what are incidental objects. A judgment of the Court would, in many cases, be necessary. For

instance, one of the largest mercantile companies in Ontario has for its objects the following only:—"To manufacture, buy, sell and deal in goods, wares and merchandise." The manufacturing, buying and selling are main objects. If manufacturing is to be considered its chief main object, then, in the opinion of Sir Louis Davies, it may sell out of the province. If selling is its main object, then it may buy out of the province. Who can determine which may be *ultra vires* outside the province? The result of the judgment, however, is that a provincial company may do business out of the province. Idington and Maclellan, JJ., judgments are definite upon the question, but that of Duff, J., may be said to be limited to the subject in question in the case, and the greater question is not disposed of.

A short statement of the positions of the Dominion and the provinces may be of interest. The Dominion has no express authority in section 92 to incorporate commercial companies. It is construed within the "peace, order and good government" clause. (*Colonial Building and Investment Association v. Attorney-General of Quebec*, 7 A.C. 96.) Apparently there is no discrimination in the classes of companies incorporated under the Dominion Act. The following are examples taken from *Canada Gazette*:—The Edmonton Cemetery Company, June 19, 1886; The Country Club, Limited, April 4, 1903; The Deseronto News Company, Limited, September 24, 1883; The publication of a newspaper or newspapers at the Village of Deseronto; The Hawkesbury Electric Light and Power Co., August 4, 1904; Lennoxville Waterworks Co., February 14, 1900; The Corona Hotel Co., August 7, 1902, and the Montreal Star Publishing Co., April 23, 1904.

However, in order to give an apparent reason for incorporation under the Dominion Act such companies are authorized "to carry on business throughout the Dominion of Canada and elsewhere."

The Companies Act, Canada, R.S.C. c. 79, s. 17, provides, "that any company incorporated under any general or special Act of any of the provinces of Canada . . . for any of the

purposes of objects for which letters patent may be issued under this Part and being at the time of application a subsisting and valid corporation, may apply for letters patent under this Part, and the Secretary of State . . . may issue letters patent incorporating the shareholders of the company so applying as a company under the Part, etc." The Insurance Act, R.S.O. c. 34, s. 4(3), provides similarly for the provincially incorporated insurance companies. In the judgment of Sir Louis Davies in *Canadian Pacific Railway v. Ottawa Fire Insurance Co.*, supra, these sections are inoperative.

The attitude of the Dominion, as indicated by Bill No. 5, an Act respecting Co-operation, now before the Senate of the Dominion of Canada having passed the House of Commons, should be considered. The following are some extracts from the Bill: The preamble, "Whereas it is desirable to provide for the creation and organization of industrial and co-operative societies among the farming and labouring classes of Canada."

The first clause of section 3: "A society which may be incorporated under this Act is a society for carrying on any industries, businesses or trades (except banking, as defined by the Bank Act, life or fire insurance) so specified in or authorized by its rules, whether wholesale or retail, including dealings of any description with land."

Section 8, sub-section 2: "A society carrying on the business of credit and savings shall not operate outside of the electoral division where it has its head office; provided, however, that when a co-operative society is organized in a city composed of more than one electoral division the minister may, in the acknowledgment of organization referred to in sub-section 5 or section 4 of this Act, or by a subsequent notice to be published in the *Canada Gazette*, authorize the society to operate beyond the limits of the electoral division where it has its head office, within the limits of the said city."

It is therefore apparent from the Bill that it provides for the creation of corporations, whether known as societies, associations or companies for the carrying on of industrial and mer-

cantile businesses or trades, and the operations of these corporations are to be confined to limited localities, not only of the various provinces, but also of the various counties of the provinces, and it must therefore be concluded that such corporations are local, provincial and private. The operation of this Bill must, undoubtedly, encroach upon the exclusive jurisdiction of the provinces, conferred by the British North America Act, section 92 (11) (16).

In the factums, argument and judgment in *Canada Pacific Railway Company v. Ottawa Fire Insurance Company*, it is nowhere suggested that the provinces have not the exclusive right to incorporate such companies. The Chief Justice, Sir Charles Kirkpatrick, in his judgment, at page 414, summed up the opinions of several Ministers of Justice reporting upon Acts of the Provincial Legislatures, in the following words:—"A careful examination of the reports made by the Ministers of Justice since Confederation shews that the unanimous opinion held, and many times expressed by them, was that a Provincial Legislature has no power to create a company with authority to do business outside of the limits of the incorporating provinces."

The converse of the above statement of the Chief Justice must be held as flowing from the statement of opinion made, namely, that the province has authority to create a company to do business inside the limits of the incorporating provinces, and, if this be so, the Federal Government has no jurisdiction to create such a company, the jurisdiction of the provinces being exclusive.

Sir Louis Davies in his judgment, at page 429, said: "If therefore my conclusion as to the meaning of the limitation "provincial objects" is correct, if the legislature could only incorporate companies to do insurance business within the province, it seems to me to follow as a consequence that any contract made by them insuring property out of the province was wholly void."

It is evident that the exclusive jurisdiction of the provinces will be invaded by the operations of the Bill, and the recent dis-

cussion of the subject makes it evident that the invasion is deliberate.

On the other hand the provinces similarly make no discrimination in such incorporations. The pretext set up by the provinces is as transparent as that of the Dominion. While companies incorporated under the Dominion Act are authorized to carry on business throughout Canada and elsewhere companies incorporated under the Provincial Act are not limited with respect to the place where their business may be carried on and consequently such business may be carried on in any jurisdiction subject to local laws. Moreover, there is no reciprocity between the Dominion and the provinces, and it has happened many times that companies have been incorporated under the Dominion and Provincial Acts with identical names.

The attitude of the Dominion and the provinces with respect to licenses to extra-provincial companies to do business within the province deserves consideration.

The Ontario statutes are most familiar to the writer, and a discussion of them may illustrate what has happened or is happening in the other provinces. The Ontario Act respecting the licensing of extra-provincial companies, 63 Vict. c. 24, expects certain classes of companies; those within the Loan Corporations Act, the Insurance Act and the Supplementary Revenue Act, and companies incorporated under the laws of the Province of Upper Canada, and companies not having gain for their object, and companies incorporated under the laws of the provinces of Canada not having their head office and doing business in Ontario at the time of passing of the Act. Companies incorporated under Dominion Acts and all other companies must take out licenses under the Act before doing business in Ontario. In cases of such companies incorporated under the laws of the provinces of Canada and of the Dominion there is no discretion in withholding the license, but there is such a discretion in the cases of other companies.

The despatches which passed between the Governments of Canada and Ontario may serve to shew their attitude on the subject:—

Extracts from a proposed report of the Minister of Justice submitted as a statement of objections to the Premier of Ontario (Hodgins, 1899-1900, page 14) :—"It has been the policy of the Parliament and Government of Canada for many years, to incorporate companies for the purpose of doing business throughout the Dominion or in two or more provinces thereof, not only as to matters relating strictly to the enumerated subjects of Dominion jurisdiction, but also as to those matters which, if limited to the territory of any one province, would be within the exclusive legislative authority of that province. This jurisdiction in the Dominion arises, in the opinion of the undersigned, not only under the general authority of the Dominion relating to the peace, order and good government of Canada, but also as affecting the regulation of trade and commerce, a subject specially assigned to the exclusive legislative authority of Canada."

Page 16:—"For the foregoing reasons, the undersigned considers that this Act ought not to be allowed to remain as it stands, and he hopes that the Provincial Government, upon the matter being called to its attention, will promote legislation to amend the Act so as to repeal those provisions which require Dominion corporations and those of old Canada to procure provincial licenses and forbid them from doing business otherwise."

Page 23:—Letter from Hon. David Mills, Minister of Justice, to Hon. G. W. Ross, M.P.P., dated March 19, 1901.

"I have your letter of the 18th instant, with reference to extra-provincial corporations. I think that you have overlooked some of the objections to that Bill. What we contend is that the regulation of trade and commerce is with us, and that you undertake to treat the Dominion corporations which we have the right to create, for the purpose of trade, in a way different from that in which you treat the corporations called into existence by your own authority. The question is not, whether you have the power to tax Dominion corporations more than you do those of the local legislature created for a similar purpose, but whether we ought to permit the policy of the Dominion to be frustrated by unjust provincial legislation. You have only to

make the tax sufficiently discriminating in order to force Dominion corporations out of existence altogether, and I do not think we ought to permit you to interfere with our policy in a matter within our jurisdiction by such a use of your power of taxation.

“The Government of Canada is not a foreign Government; the corporations that it creates are not foreign corporations; they are as much at home in the Province of Ontario as are those called into existence by the local legislature, and violent hands ought not to be laid upon them. In my opinion all legislation, on the part of a province, of this kind, ought to be disallowed if persisted in. . . . I think you will see what my position is. The question of ultra vires in this matter is quite subordinate to the general question of public policy.”

Report of the Premier of Ontario, May 14, 1901, (Hodgins, page 46) :—

“The undersigned has also the honour to state that he has received a report from the Minister of Justice with regard to the Acts respecting extra-provincial corporations in which the Minister of Justice states that he is prepared to suspend the right of disallowance of these Acts ‘on receiving assurance that the Provincial Government will, at the earliest opportunity, promote further legislation to either exempt Dominion corporations from this statute or establish equality with regard to license fees and taxation as between Dominion and provincial companies.’

“As the Provincial Government has, undoubtedly, the right to impose taxation for the purposes of revenue on all corporations, no matter whence their authority is derived, the undersigned would not recommend that the province should waive this right. The undersigned, would, however, recommend that any Act of the legislature under which a discrimination may be exercised against corporations having authority from the Dominion Government should be so amended as to establish equality in regard to license fees and taxation between Dominion and provincial companies as suggested by the Minister of Justice,

and that legislation to that effect should be introduced and carried through at the next session of the legislature."

Extract from a report of the Minister of Justice, December 12, 1902 (Hodgins, 1901-1903, page 12):—

"The undersigned observes that a Provincial Legislature has exclusive authority with regard to the incorporation of companies with provincial objects, and it was, doubtless, in the execution of this power that the Royal Trust Company was incorporated as recited in the preamble of the Legislature of Quebec. If, therefore, the company exists for the provincial objects of Quebec, it is in the opinion of the undersigned questionable whether the Legislature of Quebec has any authority to extend these or confer powers extra-provincial as to Quebec, or in any wise interfere with the constitution of the company. It has been held by the highest authority that the Dominion Parliament alone has jurisdiction to incorporate a company with objects extending to more than one province, and it may therefore be that where an existing provincial company desires to extend its franchise to other provinces, it should come to Parliament for the necessary amendment of its constitution.

Hodgins, page 22:—

An order of the Lieutenant-Governor in Council was thereupon passed, May 14, 1901, and communicated to Your Excellency's Government approving of a report of the Prime Minister of the province in which, after referring to Mr. Mills's report, he recommended that an Act of the Legislature under which a discrimination may be exercised against corporations having authority from the Dominion Government should be so amended as to establish equality in regard to license fees and taxation between Dominion and provincial companies, as suggested by the minister, and that legislation to that effect should be introduced and carried through at the next session of the Legislature. No such legislation was passed at the next session of the Legislature, and now from the section above quoted from chapter 7 of the statutes of 1903, the Act is made much more open to the objection taken by Mr. Mills in his report of May 3, 1901. The

fees of \$25 and \$50 under the Act as it stood would probably be claimed by the province not to be unreasonably considered merely as a charge in connection with the application for the issue of the licenses, and they were, perhaps, not large enough to very grievously burden the companies liable to pay them. Under the amended provisions it is obvious that the fees may be made so large as to constitute a real grievance to companies which have or may obtain Dominion charters as well as a discrimination between Dominion and provincial companies highly objectionable on other grounds. For the reasons stated the undersigned would think it his duty to recommend the disallowance of chapter 7 aforesaid, unless the Government of the province should undertake to promote, at the next session of the Assembly, legislation of the character suggested in the report of his predecessor above referred to, that is to say, either exempting corporations created by Parliament from the requirement to procure licenses or providing that the obligation to take out licenses and pay the license fees prescribed shall be imposed equally upon Dominion and provincial corporations."

Extracts from report of the Hon. the Attorney-General of Ontario, August 2, 1904 (Hodgins, page 23) :—

"The sole section of this Act with which fault is found is section 53, which amends section 18 of the Act respecting the licensing of extra-provincial corporations by striking out the first three paragraphs thereof, and Schedules A. and B. thereto inserting in lieu thereof the following words:—'There shall be paid by every corporation requiring a license under this Act such fees as may, from time to time, be approved by the Lieutenant-Governor in Council.' Disallowance is suggested, unless the Government of the province shall undertake to promote at the next session of the Legislative Assembly, legislation either exempting corporations created by Parliament from the requirements to procure licenses, or providing that the obligation to take out licenses and pay the license fees prescribed shall be imposed equally upon the Dominion and provincial corporations. No discrimination has taken place under the sec-

tion objected to and there need be no apprehension that there will be any discrimination before the next session of the Legislature, when the undersigned is of the opinion that this section should be repealed and legislation substituted in the shape of an Act specially dealing with this subject and substantially complying with the terms of the despatch of May 14, 1901, and the undersigned recommends that an undertaking be given to this effect. The undersigned does not enter upon a discussion of the constitutional question. He dissents, however, from the view that the provinces may be controlled by the Dominion in regard to the exercise of the rights of raising revenue by imposition of taxes or exaction of license fees. He also points out that the Dominion companies constantly come to the Provincial Governments for authority to hold lands, an authority which under the decision of the Courts they do not possess. The undersigned also refrains from calling attention to the anomalies constantly observed in connection with the concurrent exercise of powers by the Dominion and provinces in granting charters.

"There should be some definition of companies chartered for Dominion as distinguished from provincial objects. It should not be left to the whim of the applicant who may say in his petition, no matter how entirely local or how strictly provincial his proposed company may be, that he seeks incorporation of a company with 'Dominion objects.' It is very much like the case of a short line of railway between two towns in the interior of the province being declared 'work for the general benefit of Canada.'"

The result of this correspondence appears in section 3 of 1 Edw. VII. c. 19, and section 53 of 3 Edw. VII. c. 7, above referred to. No further legislation on the lines indicated in the report of the Attorney-General of Ontario, August 2, 1904, has been passed by the Ontario Legislature, and the questions raised are not disposed of.

It is submitted that the province should have based its case on higher grounds. The question of taxation is not the largest involved. That of control is much greater. There seems to be

no justification for the statement that there is discrimination against Dominion companies. In fact the statute discriminated in favour of Dominion companies. The license fee for a Quebec company with capital of \$1,000,000 is \$385, while for a Dominion company with the same capital it is only \$50.

However, as the statutes stand, every Dominion company is entitled as of right to a license under the Act which also confers a license in mortmain. That there should be a discretion in granting licenses, follows, I submit from a dictum in *Citizens v. Parsons* (1881) 7 A.C. 96, page 117, which has never been questioned:—"Suppose the Dominion Parliament were to incorporate a company, with power, among other things, to purchase and hold lands throughout Canada in Mortmain, it could scarcely be contended if such a company were to carry on business in a province where a law against holding land in mortmain prevailed (each province having exclusive legislative power over 'property and civil rights in the province') that it could hold land in that province in contravention of the provincial legislation; and, if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the provinces having passed Mortmain Acts, though the corporation would still exist and preserve its status as a corporate body."

Since the right of escheat is without doubt in the provinces (*Attorney-General v. Mercer*, 8 A.C. 767) it must follow that the provinces should have a discretion in granting the license. That there should be a discretion is also shewn by an application under the Ontario Act. The Toronto Junction Recreation Club became a public nuisance, and an action was brought by the Attorney-General of Ontario to declare its charter forfeited (*Attorney-General of Ontario v. Toronto Junction Recreation Club*, 8 O.L.R. 440) and subsequently the charter was declared forfeited under R.S.O. c. 191, s. 99. Immediately afterwards the persons interested in the Club procured incorporation under the Dominion Companies Act, and demanded a license under the

Ontario Extra-Provincial Corporations Act as a matter of right, under the name of the Canadian Fishing and Sporting Association, Limited. (*Ontario Gazette*, April 1, 1905.)

Moreover, there should be provincial control of Dominion companies, if merely for the purpose of effecting service of process. The difficulty of effecting service on a foreign company is notorious. The numerous reported cases on the subject are convincing as to this.

This surely shews a state of affairs needing legislative action. If such legislation is not constitutional within the British North America Act, that Act should be amended after a settlement of all questions by the Dominion and Provincial Governments. The following is suggested as a basis.

All companies may be sub-divided as follows:—

1. Public utility companies for the general advantage of Canada. These companies need no discussion. They are fully within federal jurisdiction, and the exclusive jurisdiction of the provinces may be trenched upon in controlling them: *Grand Trunk Railway Co. v. Attorney-General of Canada* (1907) A.C. 65. But it should not be left to the applicant for incorporation to ask for wider powers than are necessary merely for the purpose of putting the undertaking under Dominion control. Neither should Parliament arbitrarily declare undertakings for the general advantage of Canada when the mere description of them shew that they are not so.

2. Public utility companies of a local character. In the same way these are fully in provincial control.

3. Private corporations to implement the exclusive jurisdiction of the Dominion. The Bankers' Association, Board of Trade, Harbour Boards, Marine Hospitals, etc.

4. Private companies to implement jurisdiction of the provinces; educational and municipal corporations, etc.

5. Private companies of a commercial character which from their objects are intended to do business throughout the Dominion.

6. Private companies of a commercial character and of a local nature.

There is difficulty in dealing with the last two classes. Applicants may desire to take advantage of or avoid some special provisions of the Dominion or Provincial Acts, and there must necessarily be an overlapping of the jurisdiction in such cases. The only rule for guidance should be from a fair construction of the objects of the company. Is it intended or not at the time of incorporation that it should do business in more than one province? With respect to licensing, the first and third class should have a provincial statutory license and in all other cases the provinces should have discretion in licensing.

As in most cases, there are two sides to the question discussed in the above article. It is from the pen of an occasional contributor, than whom there is no one better qualified to discuss the subject. His leanings are in favour of more power being vested in provincial governments in reference to the incorporation of companies and their jurisdiction and control. We are not at present prepared to express an opinion on the subject; and would like to hear what may be said by those who would prefer that the federal government should have more ample control in the premises.

BREACH OF PROMISE OF MARRIAGE.

Mr. Justice Bigham, in charging the jury in an action for breach of promise of marriage, very tersely stated the law which nearly thirty years ago was subjected to the philosophic criticisms of Sir Henry James (Lord James of Hereford) in debate in the House of Commons. "This young man," said Mr. Justice Bigham, "has changed his mind. In the affairs of love it is often so, but according to our law the girl is entitled to damages." Speaking in debate on a motion proposed by Mr. Herschell (Lord Chancellor Herschell) in the House of Commons on the 6th May, 1879, in favour of the abolition of the action for breach of promise of marriage, Lord James said:—"The learned Solicitor-General (Sir H. Giffard, Lord Chancellor Halsbury)

said the damages were given for the loss that the woman sustained in consequence of not being allowed to enter into the married state—that was to say, they were to give damages to a woman for not being allowed to marry a man who was unwilling to be married. That could form no ground of damage to a woman if she had proper feelings—that she was not to be allowed to spend her life in the society of a man who had no feelings of affection towards her. The action was a punishment on the man, who refused to make two lives miserable. They were punishing a man because he had the courage to say: ‘I think it better, in the interests of both of us, that our lives should not be spent in misery.’” Lord Herschell’s motion was carried by a majority of forty-one, but the law of breach of promise of marriage has in no respect been altered from that time to the present hour.—*Law Times*.

ADMINISTRATION OF JUSTICE TO FOREIGNERS.

We like the thoughts expressed by Chief Justice Howell when opening the Assize Court at Winnipeg on 2nd inst. In referring to the calendar he said:—

“It will appear to you when the names are shown you that a number of the most serious charges are laid against foreigners. Therefore, you may come to the conclusion that we are better off without these foreigners, that they are a menace to our country. Gentlemen, I have been a long time in the law, perhaps before some of you were born. A large number of these people are from the Carpathian Mountains, a very considerable portion of them have Slavonic blood in their veins. Shall we say, ‘Am I my brother’s keeper?’ Well, they are here, gentlemen; shall we drive them out of the country or hang them or teach them? They have not had a fair chance, it seems to me, in the race of life. In the country they came from the sidewalks of the town were not made for them; the roads were good enough for them, amongst the horses and swine. If the landlord came along they got down on their knees and bowed their

faces to the ground. They could not go from their native village to another without a passport without being arrested. They come to this country and here the sidewalks are for them. They can go as they please, and liberty, too often, becomes license. By all means punish them when they do wrong, but punish them justly and kindly."

It is sentiments such as these, honestly carried out, that have made the Greater Britain what she is to-day, the greatest and freest as well as the greatest colonising nation in the world.

Whilst we deprecate the bringing to this country of undesirable immigrants, we applaud the spirit of Christian charity and empire-building wisdom that breathes through the words of the Chief Justice of Manitoba.

LORD CROMER AND MODERN EGYPT.

One of the greatest of the books of history is Lord Cromer's "Modern Egypt" just published. The *Times* in its review of it says:—"Since Caesar wrote 'De bello Gallico,' we can recall no instance of a great captain of the state telling so fully and unreservedly and with such lucidity and candour, whilst still fresh in the memory of living men, the story of great events quorum pars maxima fuit." We feel a certain added interest in the story of Egypt and the Sudan as many Canadians, and notably a member of the Bar of Ontario, Col. Frederick Denison, C.M.G., formed part of the expedition for the relief of General Gordon; Col. Denison being in command of our Voyageurs. It needs not to be told that owing to Gladstone's "shameful and fatuous hesitation and delay" they came too late to save England's hero; but the record of the former's responsibility for the death of the latter is told by Lord Cromer in these weighty words:—"In a word, the Nile expedition was sanctioned too late, and the reason why it was sanctioned too late was that Mr. Gladstone would not accept simple evidence of a plain fact, which was patent to much less powerful intellects than his own. Posterity has yet to decide on the services which Mr. Gladstone,

during his long and brilliant career, rendered in other directions to the British nation; but it is improbable that the verdict of his contemporaries in respect to his conduct of the affairs of the Sudan will ever be reversed. That verdict has been distinctly unfavourable. 'Les fautes de l'homme puissant,' said an eminent Frenchman, 'sont des malheurs publics.' Mr. Gladstone's error of judgment in delaying too long the despatch of the Nile expedition left a stain on the reputation of England which it will be beyond the power of either the impartial historian or the partial apologist to efface."

As we learn from the *Law Times* a motion is shortly to be discussed in the Imperial House of Commons with reference to the definition and limitation of the jurisdiction of judges dealing with contempt of court. Over twenty years ago Lord Selborne introduced in the House of Lords a measure of reform in reference to this matter. Some years afterwards another bill dealing with the subject was brought in by other eminent legal men in the House of Commons, but nothing has been done up to the present time. The result of the discussion of the bill before the House will be looked for with interest.

The sale of a manuscript to a publisher authorizes its publication under the author's name, but this authority would seem to be limited to the precise matter written by the author, and to change it materially is to represent him as saying something that he did not in fact say, and he might thus be held up to the public as an object of ridicule or obloquy. There is a very perceptible difference between withholding the name of an author and exploiting him as the author of that which is not his. Literary property is probably to be governed by much the same rules as property of other kinds, and if authors wish to enjoy special rights and privileges in respect to productions which they have sold, they will doubtless find it necessary to provide therefor in their contracts.—*Law Notes*.

REVIEW OF CURRENT ENGLISH CASES.

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FOREIGN JUDGMENT—JURISDICTION OF FOREIGN COURT—PARTNERSHIP ASSETS IN FOREIGN COUNTRY—PARTNER RESIDENT IN ENGLAND—ACTION TO WIND UP PARTNERSHIP—FOREIGN JUDGMENT BY DEFAULT.

In *Emanuel v. Symon* (1908) 1 K.B. 302 the Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L.JJ.) have failed to agree with the judgment of Channell, J. (1907) 1 K.B. 235 (noted ante, vol. 43, p. 282). The case is an important one on the question of enforcing foreign judgments. The facts were that the plaintiffs and defendants were partners in a gold mine and other property in Australia. The defendant was domiciled in England. The plaintiff, while he was so domiciled, brought an action in an Australian court to wind up the partnership. The writ was personally served on the defendant in England, but he did not appear in the action, and the result of the proceedings in the Australian court was that judgment went against him by default, and a reference was directed to take the partnership accounts, and the partnership was found indebted in a sum of over £7,000, which, under the final order of the court, was ordered to be paid by the partners. The plaintiff paid the amount, and then sued the defendant in the present action to recover his proportion of the liability. The defendant denied that he was bound by the adjudication of the colonial court. Channell, J., held that he was, but the Court of Appeal have now reversed that decision. It was, on the part of the plaintiffs, claimed that the possession of property within the jurisdiction of the colonial court gave that court jurisdiction over the defendant in personam. But Lord Alverstone, C.J., though conceding that that fact gives the colonial court jurisdiction to deal with the property, yet held that it does not give jurisdiction over an absent defendant in personam, who is domiciled in another country. As Buckley, L.J., points out, the plaintiff was attempting to add to the five cases enumerated by Fry, J., in which the court will enforce a foreign judgment, a sixth case, viz., when a defendant has property within the foreign forum; but the Court of Appeal was unanimous that that was not admissible. It may be useful here to recall the five cases

stated by Fry, J. 1. Where the defendant is a subject of the foreign country in which the judgment has been obtained. 2. Where the defendant was resident in the foreign country at the time the action was begun. 3. Where the defendant in the character of plaintiff has himself selected the forum in which he is afterwards sued. 4. Where he voluntarily appeared. 5. Where he has contracted to submit himself to the forum in which the judgment was obtained.

DEBTOR AND CREDITOR—ACCEPTANCE OF BILL OR PROMISSORY NOTE
FOR DEBT—AGREEMENT NOT TO SUE.

In re A Debtor (1908) 1 K.B. 344, though a bankruptcy case, deserves attention. The question was whether a creditor was in a position to give a bankruptcy notice. He was a judgment creditor of the debtor, but had received a bill of exchange for the debt, this bill he had indorsed to a third party for value, in whose hands it still was, but it had been dishonoured. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) held that the acceptance of the bill by the creditor amounted to an agreement not to enforce the debt during the currency of the bill, and afterwards, so long as it was outstanding in the hands of the third party to whom it had been indorsed for value, and therefore, the creditor was not in a position to give a bankruptcy notice.

CORPORATION—DISSOLUTION OF COMPANY—BONA VACANTIA—
CHATELS REAL—LANDLORD AND TENANT—SURETIES FOR
RENT.

Hastings v. Letton (1908) 1 K.B. 378 deals with a point which does not appear to have been previously decided, and one that seems unlikely often to have occurred. A corporation when it is dissolved, as a rule, as a preliminary step, disposes of all its property. The English Companies Act, ss. 142 and 143, seems to require that it should do so. In this case, however, a limited company were lessees of premises, and there were sureties for the payment of the rent. The company was dissolved and no disposition had been previously made of the leasehold, and the question arose, what effect had the dissolution on the leasehold. Did the term pass to the Crown as bona vacantia, and were the sureties still liable for the rent, notwithstanding the dissolution, or was the term at an end? The action was by

the lessors against the sureties for rent accrued after the dissolution, and the judge of the County Court gave judgment in favour of the plaintiffs, but the Divisional Court (Darling and Phillimore, JJ.) reversed the judgment on the ground that on the dissolution of the company the lease came to an end, and the reversionary estate in the lessors was accelerated, and the lease being at an end, the sureties for the rent were consequently discharged. Darling, J., lays it down that as to all lands which are vested in a corporation at the time of its dissolution, they revert to the original grantors thereof, as laid down in Blackstone's Commentaries, and, consequently, there is no escheat to the Crown in such a case, unless the Crown happened to be the grantor.

**MORTGAGE—TRADE FIXTURES—HIRE AND PURCHASE AGREEMENT—
RIGHT OF MORTGAGEES TO FIXTURES—MORTGAGOR IN POSSESSION.**

Ellis v. Glover (1908) 1 K.B. 388 is the case to which we referred ante, p. 196, in our note of the case of *Crossley v. Lee*. In this case freehold premises on which a laundry was carried on, were, in November, 1902, mortgaged to the plaintiff. The mortgagor consenting not to remove any fixtures then or thereafter placed on the premises, without the mortgagor's consent. In June, 1903, the mortgagor being in possession, procured machinery for the purpose of his business under a hire and purchase agreement, which was duly fixed up in the premises and attached to the freehold. The agreement provided that in default of payment of the instalments of the price, as they became due, the vendor might enter and remove the machinery. Default was made and the vendor accordingly entered and removed the machinery, the present action was by the mortgagee claiming damages for such removal. Phillimore, J., who tried the action dismissed it. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) reversed his decision, and in doing so distinguished the case from *Gough v. Wood* (1894) 1 Q.B. 713, but without impugning the rule there laid down, viz., that, in the absence of any agreement to the contrary, a mortgagor in possession has the implied right to permit trade fixtures to be affixed to, and removed from, the mortgaged premises, at any time before the mortgagee takes possession. In the present case, the covenant by the mortgagor, not to remove any fixtures without the mortgagee's consent, was held to be a stipulation which

prevented the mortgagor having any implied power to exercise such a right of removal, and therefore the fixtures, being affixed to the freehold, passed to the mortgagee who was entitled to damages for their removal.

SOLICITOR AND CLIENT—LIEN OF SOLICITOR ON PAPERS—ACCEPTANCE OF SECURITY BY SOLICITOR—WAIVER OF LIEN.

In re Morris (1908) 1 K.B. 473 was an application by a client against his solicitors to compel the delivery up of papers on which they claimed a lien, on the ground that he had given the solicitors security for payment of their costs, the acceptance of which had operated as a waiver of any lien on his papers. The evidence was conflicting, but the court accepted the solicitor's version that the security was not given or accepted as security for costs generally, but merely for those in one particular action, and therefore it was held there had been no waiver of the lien. The Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L.JJ.) lay it down, that where a solicitor receives security for his general costs from his client it is his duty to inform his client expressly if he still intends to retain a lien, otherwise the lien will be waived.

SHIP—CHARTER-PARTY—DEMURRAGE—LAY DAYS—ARRIVAL AT PLACE OF LOADING—OBLIGATION OF MASTER TO GO TO BERTH NAMED BY CHARTERER.

In *Leonis SS. Co. v. Rank* (1908) 1 K.B. 499, the Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L.JJ.) have reversed the judgment of Channell, J. (1907) 1 K.B. 244 (noted ante, vol. 43, p. 364). The action was by ship-owners for demurrage. The charter-party provided that the charterers should ship a cargo and that the time for loading should commence to count twelve hours after they received written notice from the master of the ship that it was in readiness to receive a cargo. The ship arrived at the port of lading and anchored in the river within the port a few ship's length from the pier, and a written notice was given to the charterers of its readiness to receive cargo. The charterers required the ship to be brought alongside the pier but owing to the crowded state of the port she was delayed in getting a berth. The place where the ship anchored was not a usual but a possible loading place. Channell, J., held that the time did not begin to run till the vessel got a berth alongside the pier. The Court of Appeal,

on the other hand, held that the time began to run from the delivery of the notice, and the delay occasioned by the vessel not being able to approach the pier must fall on the charterers and not on the shipowners.

WEIGHTS AND MEASURES—FALSE OR UNJUST MEASURE—POSSESSION OF FALSE MEASURE BY SERVANT FOR HIS OWN FRAUDULENT PURPOSE—EMPLOYER.

Anglo-American Oil Co. v. Manning (1908) 1 K.B. 536. This was a case stated by magistrates. The appellants were prosecuted for having a false measure. The facts disclosed that the appellants, who were hawkers of coal oil, had furnished their servant with a proper lawful measure, but for his own fraudulent purposes carried with him when hawking the plaintiff's goods, a measure with a quantity of soap in it, which had the effect of rendering the measure false to the extent of three and a half pints. It was not proved that the appellants were cognizant of or sanctioned or approved of the conduct of their servant, or derived any benefit from his fraud. In these circumstances, Channell, Bray and Sutton, JJ., held that the appellants could not be convicted of a breach of the Weights and Measures Act.

LIFE INSURANCE—FRAUD OF INSURANCE AGENT—DECEIT—AVOIDANCE OF POLICY—RECOVERY BACK OF PREMIUMS.

Kettlewell v. Refuge Assurance Co. (1908) 1 K.B. 545. In this case, it may be remembered, the plaintiff had taken out a policy of insurance with the defendant company. After it had been in force for a year the plaintiff proposed to let it lapse, whereupon the defendants' agent represented that if she continued to pay the premiums for four years more, the policy would remain in force and she would have no more premiums to pay. Relying on this representation she paid the four years' premiums, but on the expiration of that period the defendants refused to give her a paid-up policy. The plaintiff sued to recover back the four years' premiums. Phillimore and Bray, JJ. (1907) 2 K.B. 242 (noted ante, vol. 43, p. 619) held that the plaintiff was entitled to recover, and the Court of Appeal (Lord Alverstone, C.J., and Barnes, P.P.D., and Buckley, L.J.) have affirmed that decision, though they were not altogether agreed as to the basis on which the plaintiff was entitled to recover. Lord Alverstone, C.J., was of the opinion that the money could

be recovered either by way of damages for deceit, or as money had and received to the plaintiffs' use, with which Barnes, P.P.D., agreed, but Buckley, L.J., thought that the contract being only voidable at the option of the plaintiff until she had exercised that option, the defendants had incurred liability and she was, therefore, not in a position to say she had received no consideration, and, therefore, could not recover the premiums as money had and received, but that the defendants could not retain a profit derived through the fraud of their agent, and on that ground, were liable to refund the premiums.

HIGHWAY—OBSTRUCTION—NUISANCE.

The King v. Bartholomew (1908) 1 K.B. 554. The defendant was indicted for nuisance in obstructing a public highway. The obstruction consisted of a coffee stall erected in the middle of a public highway. The stall was a permanent character and gas and water were laid on, and it was assessed for taxes. The jury found that the coffee stall was an obstruction, but that it did not appreciably interfere with the traffic of the street. On a case stated, the court (Lord Alverstone, C.J., and Lawrance, Ridley, Darling and Channell, JJ.) held that on that finding the defendant must be acquitted.

WATERWORKS—EXPROPRIATION OF LAND—SPECIAL VALUE OF LAND EXPROPRIATED.

In re Lucas and Chesterfield (1908) 1 K.B. 571. Land had been expropriated by virtue of statutory powers for the purpose of a reservoir, and the question was submitted by arbitrators, whether the special value of the land for the purposes of a reservoir could be taken into account in fixing the compensation to be paid, notwithstanding that the property could not have been used for a reservoir unless statutory power for the compulsory purchase of other land were first obtained. Bray, J., answered this question in the affirmative.

DEFAMATION—LIBEL — ABSOLUTE PRIVILEGE — STATEMENTS OF PROVINCIAL OFFICERS—REPORT OF OFFICIAL RECEIVER UNDER WINDING-UP ACT.

Bottomley v. Brougham (1908) 1 K.B. 584 was an action brought against the defendant who was an official receiver for an alleged libel contained in a report made by him in the course

of his duty in certain winding-up proceedings. The defendant applied to dismiss the action as being frivolous and vexatious and an abuse of the process of the court, and the application was granted by Channell, J.

SOLICITOR—BILL OF COSTS—FORM OF BILL OF COSTS—SOLICITORS ACT, 1843 (6-7 VICT. c. 73) s. 37—(R.S.O. c. 174, s. 34).

Cobbett v. Wood (1908) 1 K.B. 590 was an action by solicitors to recover costs incurred by them on behalf of the defendant's wife. The plaintiffs had acted in a suit in the Probate and Divorce Court in which the wife had sued unsuccessfully for a judicial separation and in which the defendant had been ordered to pay costs as between party and party, which he had paid. They had also acted for the wife in proceedings before justices in which she was successful and the defendant had been ordered to pay £3 3s. for costs which the defendant had paid. The bill delivered was entitled in the Probate and Divorce Division of the High Court of Justice and included solicitor and client costs, which had not been allowed in the party and party taxation in the judicial separation proceedings, but did not include the costs allowed on the party and party taxation. The bill also included extra solicitor and client costs of the proceedings before the justices, over and above the £3 3s. which had been paid. It was objected on the part of the defendant, that no proper bill had been delivered, because the bill did not include the party and party costs of the judicial separation proceedings, and because it included costs of proceedings before justices, which were not in the Divorce Court. These objections were overruled by Pickford, J., but on the authority of *Cale v. Jarvis* (1897) 1 Q.B. 418, he held that the solicitors could recover no more costs of the proceedings before the justices than the justices had awarded.

PROBATE—WILL—INCORPORATION IN WILL OF UNEXECUTED MEMORANDUM.

The University College of N. Wales v. Taylor (1908) P. 140. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have been unable to agree with the decision of the president of the Probate Division (1907) P. 228 (noted ante, vol. 43, p. 614). Probate had been granted in common

form of a will dated June 27, 1905, of a testator who died July 15, 1905, and of an unattested document dated March 12, 1905, which was claimed to be incorporated in the will. By his will the testator gave a legacy of £10,000 to the University of Wales "upon such terms and conditions and subject to such rules and regulations as are contained and specified in any memorandum amongst my papers written or signed by me relating thereto." Amongst the testator's papers was a memorandum in his own handwriting dated March 12, 1905, addressed to the executors of a former will in which he specified two conditions of a theological nature as to the individuals to be benefitted by similar bequests, and also a condition that they should be of Welsh birth, and other matters. This was the paper incorporated with the will. The application to the President was to revoke the probate and to exclude this document. There was evidence that it had been produced at interviews between the testator and his solicitor, when instructions were given for the last will, and that the will was prepared on the footing that this was the document referred to therein, and the President refused the application, holding it to have been incorporated in the will. The Court of Appeal, on the other hand, held that in order that an unattested document may be incorporated, it is necessary that it should be in existence when the will is executed and be distinctly and specifically referred to therein. Here they considered that the use of the words "any document" precluded the supposition that the memorandum of March 12, 1905, was intended, because that related to the disposition made by the former will and there was nothing in the will to shew that the testator intended that document to be the one referred to in the last will.

SALE OF GOODS—SPECIAL CONDITIONS OF SALE—FIXED PRICES—
AGREEMENT NOT TO SELL TO SPECIFIED CLASS—INDUCING
DEALERS TO COMMIT BREACH OF CONTRACT—FRAUD—INTER-
FERENCE WITH CONTRACTUAL RELATION—LEGAL RIGHT—
DAMAGE.

National Phonograph Co. v. Edison Bell Co. (1908) 1 Ch. 335, is one of those cases arising out of the special conditions under which trade is carried on in the present day. Plaintiffs were manufacturers and defendants were dealers in phonographs and phonographic records. The sale of the machine necessarily draws with it the sale of the records which appears to

be the most profitable part of the trade, and in order to protect and further their trade, the plaintiffs made special agreements with factors for the sale of their goods, whereby the factors bound themselves not to sell to persons on what the plaintiffs called their "suspended list" nor to dealers who did not enter into an agreement not to sell below a specified price, nor to persons whose names were on the plaintiffs' "suspended list." The defendants were on this "suspended list," but in order to procure the plaintiff's goods, they induced a dealer named Ell, who had signed the above mentioned agreement, to sell goods purchased from the plaintiffs' factors in his own name, to the defendants' agent for less than the price specified in the agreement, Ell not knowing that the defendants were on the suspended list. The defendants also induced two other persons named Leach and Hughes, falsely to represent themselves as independent dealers, and as such to purchase, nominally for themselves, but really for the defendants, from the plaintiffs' factors goods of the plaintiff. The present action was brought to restrain both of these proceedings and for damages. Joyce, J., who tried the action dismissed it, holding that neither of the alleged grounds of complaint gave the plaintiffs any right of action. The Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L.JJ.) although agreeing with Joyce, J., as to the Ell transaction, differed from him in regard to the Leach and Hughes transaction, and held that the defendants having induced those two persons to procure goods by means of misrepresentations were guilty of a fraud on the plaintiffs for which they were liable to an action, and the plaintiffs were entitled to an injunction restraining the defendants from inducing by means of fraudulent and improper means, the plaintiffs' factors from breaking their agreements with the plaintiff.

WILL—CONSTRUCTION—GIFT OF RESIDUE TO A. AND "SIX CHILDREN NOW LIVING" OF C.—ALL BUT ONE OF A CLASS DEAD AT DATE OF WILL—PRESUMPTION OF MISTAKE—REJECTION OF SPECIFIED NUMBER.

In re Sharp, Maddison v. Gill (1908) 1 Ch. 372. In this case a testator had given the residue of his estate to trustees upon trust for certain named persons and the six children of the late S. F. Okey in equal shares as tenants in common. By a codicil the testator stated that by the six children of the said S. F. Okey

he meant to benefit the six children now living of the said S. F. Okey, by his first wife and no others. At the date of the will five of the six children were dead, the last of the five to die being referred to by the testator in his will as "my late niece, S.M." The survivor was still alive and the question was whether he was entitled to the share bequeathed to the "six children," and Joyce, J., held that he was, because he held that the children referred to by the will and codicil were the living children of S. F. Okey and his first wife, and, the court might properly reject the number "six" on the presumption of a mistake on the part of the testator, as to the number actually living.

**LEGACY—BEQUEST SUBJECT TO OBLIGATION TO MAINTAIN INFANTS
—INTEREST ON LEGACY.**

In re Crane, Adams v. Crane (1908) 1 Ch. 379. A testator bequeathed the income of a legacy to his daughter-in-law during her widowhood, subject to the obligation of maintaining her deceased husband's children. The legacy was paid over by the trustees of the will within a year from the testator's death without interest, but the trustees of the legacy claimed that as an obligation of maintenance of the children had been imposed on the daughter-in-law, interest should be paid on the legacy from the testator's death, but Eady, J., held that the case was distinguishable from the cases where a testator gives a legacy to infants, as to whom he stands in loco parentis, with a direction that the income is to be applied for their maintenance, and that the present being a gift to an adult, it did not bear interest from the death until paid over to the trustee.

**WILL—CONDITION—FORFEITURE—CONDITION NOT TO ENTER NA-
VAL OR MILITARY SERVICE—PUBLIC POLICY.**

In re Beard, Reversionary and General Securities Company, Limited, v. Hull (1908) 1 Ch. 383. Eady, J., decided that it is contrary to public policy to impose any condition divesting the interest of a devisee or legatee if he enters the naval or military service of the country, and that such a condition is therefore void.

 REPORTS AND NOTES OF CASES.

 Province of Ontario.

 COURT OF APPEAL.

Full Court.]

[Feb. 22.

KEEWATIN POWER CO. v. TOWN OF KENORA.

Rivers and streams—Non-tidal rivers—Grant of lands bordering on—Title to bed of river ad medium filum aquæ—Common law doctrine—R.S.O. 1897, c. 3, s. 1.

The common law of England relative to property and civil rights—as introduced into this province in 1792, now enacted in the R.S.O. 1897, c. 3, s. 1—except in so far as repealed by Imperial legislation having force in this province, or by provincial enactments, is the rule for the decision thereof; so where a grant of land is made bordering on a river, if a tidal river, the title to the bed is presumed to remain in the Crown, unless otherwise expressed in the grant; whereas if non-tidal, whether navigable or not, the title in the said bed ad medium filum aquæ is presumed to be in the riparian proprietor.

Where, therefore, lands were granted by the Crown bounded by the Winnipeg River, a non-tidal river, the title to the bed of the river ad medium filum aquæ was held to have passed to the riparian owner by virtue of the grant to him.

Judgment of ANGLIN, J., at the trial reversed.

Wallace Nesbitt, K.C., Jennings, L. G. McCarthy, C. A. Moss, Rowell, K.C., and Wilkie, for various parties.

Full Court.]

[March 24.

LONDON AND WESTERN TRUSTS CO. v. CANADIAN FIRE INS. CO.

Fire insurance—Lease—Change in nature of risk—Absence of notice or knowledge by landlord—"Control" of landlord—Omission to notify insurers.

The judgment of a Divisional Court in favour of the plaintiffs was affirmed by the Court of Appeal, substantially for the same reasons as those appearing in the opinion of the Divisional

Court, delivered by BOYD, C., 13 O.L.R. 540. MEREDITH, J.A., dissenting.

Wallace Nesbitt, K.C., and N. W. Rowell, K.C., for defendants. Gibbons, K.C., for plaintiffs.

HIGH COURT OF JUSTICE.

Clute, J.]

RE WILKIN.

[Feb. 24.

Will—Gift to two named daughters—Subsequent provision in case of dying without issue—Death in testator's lifetime.

A testator, after leaving the residue of his estate to be equally divided amongst his four daughters, C., M., A. and H., directed that if C. and M. should "die without leaving a child or children" his executors should pay annually the interest accruing on the money bequeathed to them to his son R. during his lifetime, and after his son's death the principal should be equally divided amongst all the living children of his two other daughters, M. and H., or attaining their majority.

Held, that the words "die without leaving a child or children" meant in the testator's lifetime; and that therefore, the said two daughters C. and M., who survived the testator, took the shares bequeathed to them absolutely.

Swabey, for executors. *M. C. Cameron*, for official guardian.

Falconbridge, C.J.K.B.]

[March 23.

RE VICTOR VARNISH CO.

CLARE'S CLAIM.

Banks—Security on stock of trading company—Guarantor paying company's debt—Assignment of security to him by bank—Rights of assignee—Winding-up.

Winding-up application. Appeal by the liquidator from the finding of the Master in Ordinary. The company was indebted to the Bank of Hamilton and as security for this debt held a guarantee executed by Clare and others. Subsequently the company gave to the bank a demand note for the debt which was secured by an assignment of the company's stock in trade, under section 74 of the Bank Act, 1890 (now R.S.C. 1906, c. 29, s. 28). Clare paid the bank the amount of the debt and the bank

executed an assignment of the security to him. Clare filed his claim as a creditor and claiming also a lien for the amount of his claim upon the stock in trade of the company. The liquidator admitted Clare to be a creditor, but disputed the validity of the lien. The Master in Ordinary gave judgment declaring Clare to be entitled to rank as a creditor for the amount paid, and to a lien on the stock in trade of the company, holding that he was entitled to all the rights and remedies against the assets that would have been open to the bank before the bank assigned to Clare.

Held, 1. The act does not expressly provide that the security may be assigned, and as the assignment had not been perfected under the Judicature Act, or by notice given prior to the winding-up order, and as there was no right of subrogation which would render the assignment unnecessary, the lien could not be allowed.

2. As the provisions of section 88 of the Bank Act infringe upon the policy of the provincial law which requires registration, the language of the Act must not be strained so as to confer a priority which is not reasonably necessary to the carrying out of the policy of the Act.

3. To construe the Act, as if it provided for the assignment of the security of a third party would open the door to a fraudulent use of the Act, and so it should not be construed as impliedly authorizing that which it does not expressly authorize, or which is not reasonably necessary to the working of the Act.

4. The special security conferred by the Act is at an end when the document is assigned by the bank to a third party, and such assignment does not, therefore, carry with it any special priority. The securities referred to are only those which are legally assignable. See *In re Russell*, *Russell v. Shoolbred*, 29 Ch.D. pp. 265 and 266.

The appeal allowed but without costs.

J. M. Clark, for liquidator. *J. E. Jones*, for claimant.

Anglin, J.—Trial.]

[March 27.

WHITTING v. FLEMING.

Slander imputing unchastity—Interlocutory judgment for default of defence—Assessment of damages—Necessity for setting case down for assessment—Costs.

Action for a slander imputing unchastity to plaintiff brought

under R.S.O. 1897, c. 68, s. 5, tried with a jury at Walkerton. There was no averment or proof of special damage and interlocutory judgment was signed in default of defence, and the case was entered for assessment of damages merely. It was contended on behalf of the defendant that section 5, which says that "the plaintiff may recover nominal damages without the averment or proof of special damage," in the absence of such averment and proof, restricts the plaintiff to nominal damages. For the plaintiff it was contended that the effect of the statute is to entitle the plaintiff absolutely to nominal damages, and that the jury may in their discretion also enable her to recover substantial damages.

Held, 1. The purpose of the legislation, was, in cases in which the plaintiff could not prove special damage, to permit her to rehabilitate her character by the verdict of a jury which would be fully accomplished by a verdict for nominal damages, and that this was the full measure of the right intended to be conferred by the statute.

2. That as the plaintiff could not obtain final judgment for the nominal damages to which she was entitled and for her costs without bringing the case down for an assessment of damages by a court for the trial of actions (Rule 589) she is entitled as part of the costs of the action necessarily incurred by her, to the costs incurred in connection with the assessment of damages.

D. Robertson, K.C., for plaintiff. *O. E. Klein*, for defendant.

Riddell, J.—Trial.]

[March 28.

VACCARO v. KINGSTON & PEMBROKE RY. CO.

Railway—Hand-car—Train.

Held, that a hand-car is not a "locomotive, engine, machine, or train" within the meaning of the Railway Act, and this is not affected by the definition given in R.S.C. 1906, c. 37, s. 2(32).

Flock, for plaintiff. *T. J. Meredith*, K.C., for defendants.

Province of Manitoba.

COURT OF APPEAL.

Full Court.]

[Feb. 29.

MORDEN WOOLLEN MILLS CO. v. HECKELS.

Company—Liability for calls on stock—Allotment—Validity of acts of directors when some disqualified—Election of directors without ballot—Certificate of indebtedness as prima facie evidence.

Appeals heard together from decision of a County Court judge dismissing five actions to recover calls on shares held by the several defendants in the plaintiff company, incorporated under the Manitoba Joint Stock Companies Act. The defendants had all paid the first call of 20 per cent. made by the provisional directors. The latter had also made a second call of 25 per cent. which was paid by three out of the five defendants. At the first annual meeting of the shareholders held in January, 1905, a board of nine directors was elected by unanimous vote and without balloting. The board made a third call of 20 per cent. in September, 1905, but none of the defendants paid this call. At the second annual meeting nine directors were again elected by unanimous vote, but three of them were in arrears for unpaid calls on their stock and so were not qualified to be directors according to the Act. This board afterwards made a fourth call of twenty per cent. At the trial the plaintiffs produced certificates of indebtedness in accordance with section 53 of the Act, which makes them prima facie evidence of the debts. The defendants who had not paid the second call contended that the stock had not been allotted when that call was made. As to the third call the defence was that there was no evidence that notice of it was given and, as to the last call, they claimed that it had been made by an unqualified board of directors and was therefore illegal.

Held, 1. Subscribers who pay a call cannot be heard to deny the allotment of their shares.

2. The production of the certificates was prima facie evidence of notice of the calls.

3. The presence on the board of three unqualified directors was not sufficient to invalidate the acts of the board, since the

remaining six were more than the quorum required by the by-laws. *Scadding v. Lorant*, 3 H.L.C. 443; *Bank of Liverpool v. Bigelow*, 12 N.S.R. 236, and *Munster v. Cammell Co.*, 21 Ch.D. 183, followed.

4. It was not necessary that a ballot should be taken for the election of directors when no more than the necessary number were nominated.

Appeals allowed with costs.

McLeod, for plaintiffs. *Hoskin*, for defendants.

KING'S BENCH.

Mathers, J.] IN RE IDEAL FURNISHING CO. [Feb. 27.

Winding-up Act—Lien under writ of execution placed in sheriff's hands after commencement of the winding-up.

The claimants' writ of execution was placed in the sheriff's hands after the service of the notice of the presentation of the petition for a winding-up order, but before the order was made, and there was no doubt that, if section 66 of the R.S.C. c. 129, were still in force, they would have had no lien; but they contended that the law had been changed in the revision of 1906, and that, under section 84 of R.S.C. 1906, c. 144, they had a right to proceed under their execution to realize their judgment.

Held, that sub-section 1 of the new section 84, is so far as applicable to the facts of this case, is not different in effect from the former section 66. Standing alone and taken literally it would mean that a writ of execution could never become a lien on the goods of a company, whether the company was being wound up or not. It must therefore be read in connection with section 5, which defines when the winding up shall be deemed to commence, and must be construed as relating only to a company in process of being wound up.

Quære, what would be the result in a case where the sheriff had sold the goods and had the proceeds of the sale in his hands when notice of petition was served? Under the old section, the money would have gone to the liquidator, but to obtain that result under section 84 as it now stands, sub-section 2 would have to be read into sub-section 1.

The execution creditor's claim was disallowed, but in view of the uncertainty caused by the change in the form of the Act, without costs.

Phillips, for execution creditors. *Dennistoun* for liquidator. *Hoskin*, for other creditors.

Cameron, J.] HANNAH v. GRAHAM. [Feb. 24.

Specific performance—Misrepresentation as to quality of land purchased—Caveat emptor—Fraud—Rescission of contract.

Defendant resisted the plaintiff's claim for specific performance of a contract for the sale of a farm to him by the plaintiff, alleging that he had wholly relied on the plaintiff's representations that the land consisted of a black sandy loam of a certain thickness with clay bottom, free from white sand and worth \$15 per acre; and that those representations were all untrue. The defendant did not inspect the land before purchasing, but consulted parties other than the plaintiff as to the quality, location and value of the property.

Held, that apart altogether from the conflict of testimony as to the making of the alleged misrepresentations and as to the quality of the soil, the defendant could not succeed in having the contract rescinded on the grounds set up, as public policy requires that persons shall be required to exercise ordinary prudence in their business dealings instead of calling on the courts to relieve them from the consequences of their own inattention and negligence. The doctrine laid down in *Attwood v. Small*, 6 C. & F. 232, as follows, "If a person, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him, he cannot be heard to say that he was deceived by the vendor's misrepresentations, the rule being caveat emptor," should be applied in this case. See also, *Fry on Specific Performance*, p. 295, and *Slaughter v. Garson*, 13 Wall (U.S.) 379.

McLaws and Robinson, for plaintiff. *Robertson and Locke*, for defendant.

Province of British Columbia.

SUPREME COURT.

Morrison, J.] REX v. NABAIN. [March 14.

Immigration—Habeas corpus—Detention under British Columbia Immigration Act, 1908—Provincial law ultra vires.

Application for habeas corpus on behalf of several Hindus

who had complied with the requirements of the Dominion Immigration Act, but, who being unable to stand the test, set out in the British Columbia Immigration Act, 1908, were arrested by the provincial authorities and sentenced for its infraction.

Held, quoting section 95 British North America Act and section 30 of the Dominion Immigration Act and referring to other sections of the latter Act and the cases of *Grand Trunk Ry. Co. v. Attorney-General of Canada* (1907) A.C. 68 and *Toronto v. Canadian Pacific Ry. Co.* (1908) A.C. 54, that the British Columbia Immigration Act, 1908, is ultra vires of the legislature inasmuch as it is repugnant to the Dominion Immigration Act.

Woods, for applicants. *Taylor*, K.C., for Provincial Government.

Flotsam and Jetsam.

HIGHLY SUSPICIOUS.—One of the agents in a Midland Revision Court objected to a person whose name was on the register, on the ground that he was dead. The revision attorney declined to accept the assurance, however, and demanded conclusive testimony on the point.

The agent on the other side arose and gave corroborative evidence as to the decease of the man in question.

"But, sir, how do you know the man's dead?" demanded the barrister.

"Well," was the reply, "I don't know. It's very difficult to prove."

"As I suspected," returned the barrister. "You don't know whether he's dead or not."

Whereupon the witness continued: "I was saying, sir, that I don't know whether he is dead or not; but I do know this: they buried him about a month ago on suspicion."—*Harper's Weekly*.

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MAY 1.

NO 2.

THE EXCHEQUER COURT AND ROYAL COMMISSIONS.

The general approval of the appointment of the new judge of the Exchequer Court of Canada shews how much it is to the advantage of a government, to say nothing of the people, when such appointments are made from a sense of what is best in the interest of the country rather than what may seem to be for the benefit of a party. The gain in the one case is lasting, in the other it is soon forgotten, and only serves to whet the appetite of the greedy partisan.

The approval given to the selection of Mr. Cassels has also been given, without stint, to the position taken by that gentleman with regard to the work which he has been called upon to do, an inquiry into charges made against certain officials in the Department of Marine and Fisheries. More than some of his colleagues, Judge Cassels has shewn a proper appreciation of what is due to the position of a judge, and his sense of the danger which attends any departure from his legitimate functions. The dignity of the Bench and therein the country at large, has suffered too much from such departures in the past.

Except under very special circumstances, judges should not be asked to undertake any extra judicial duties, or serve on commissions. This principle is already recognized by legislation. The Judges Act (R.S.C. c. 138, s. 33) enacts as follows: "No judge of the Supreme Court of Canada or of the Exchequer Court of Canada or of any Superior or County Court in Canada shall, either directly or indirectly as director or manager of any corporation, company or firm, or in any other manner whatever, for himself or others, engage in any occupation or business other than his judicial duties; but every such judge shall devote himself exclusively to such judicial duties."

From the above section it is very clear that a judge may not be a director of a company. We regret to say that one judge at least, in the Province of Ontario, does not observe the law.

The section would also seem to prevent a judge acting as an arbitrator, or on a Royal Commission. The case of the judge of the Exchequer Court is further specially provided for by s. 6 of the Exchequer Court Act (R.S.C. c. 140), which reads: "The judge of the court shall not hold any other office of emolument, either under the Government of Canada or under the Government of any province of Canada." The latter provision has been law for many years. In the past it has been circumvented by Parliament voting a sum of money for the purpose of paying a commissioner, who happened to be a judge, for his work on a specified commission. This has been understood to be a virtual abrogation of the statute. We think it is a vicious method of legislation, but it has apparently become recognized as a way to enable a judge to obtain increased pay, and, since it has become customary, Judge Cassels might have taken advantage of the custom to augment his salary—none too large. In his letter to the Prime Minister, which is part of the correspondence relating to his appointment as commissioner, he said: "I have always believed, and do still believe, that no judge or other judicial officer should accept any position as commissioner, arbitrator or otherwise, which may yield him any emolument over and above the pay which the law allows him in virtue of his judicial position. I freely concede to others the right to entertain different views on this subject. I am too old, however, to change my own view." Judge Cassels is, therefore, entitled to all credit for refusing to accept an emolument for the additional work he has been asked to do. His refusal is a new departure, and we trust is the dawn of a better thought with reference to such matters. That judge would be regardless of the good opinion of his fellows, as well as exhibit a mind incapable of appreciating so excellent an example, who should in the future fail to follow it.

Nothing can more seriously affect the integrity of the Bench than the supposition that the judges are ready, for the sake of additional emolument, to undertake any employment outside of the sphere of their regular duties.

The line between what is quasi-judicial and quasi-political, is hard to define, and it cannot be overstepped without affecting the integrity of the Bench, and consequently lowering it in the estimation of the public. Nor is there any need for running risks of so serious a nature. There are men in the legal profession, if professional knowledge is required, as well qualified both by character and capacity as any judge on the Bench for conducting important investigations, and whose judgments, even where political questions are involved, will carry as much weight as those of any judge, and these can be freely discussed and commented on without danger to the best interests of the community.

Recognizing that by conducting the investigation the work of the Exchequer Court would be interfered with, Judge Cassels suggested some provision being made, meanwhile, for the administration of the court, and suggested that the registrar might be appointed a deputy judge, with an appeal, if necessary, to himself. At the present time the registrar has not powers equivalent to those of the registrar of the Supreme Court. The necessary power is proposed to be given him by a bill now before Parliament, which, however, has not yet progressed beyond its first reading. There seem to be very strong reasons for the registrar of the Exchequer Court having increased powers. Not only is the judge of that court frequently hearing cases at a great distance from Ottawa, but he is the only judge; consequently chamber matters, which might be disposed of by the registrar, have to await the return of the judge. In the case of the Supreme Court there are six judges, none of whom has to leave Ottawa, and the registrar also has certain powers of a judge in chambers.

If the registrar of the Exchequer Court be given increased powers there might not be much for a temporary judge to do; but, however that may be, there should be no mere deputy from whose decision an appeal would lie to the judge himself. Such an arrangement would involve a complication of the ordinary course of procedure, and should not be permitted, especially as

it would in some cases cause unnecessary delay and expense. In our opinion the person who is appointed to preside during the absence of the judge of such an important court as the Exchequer Court should be a functionary whose decisions should be equipollent with those of the judge whose place he fills. There is an obvious impropriety in providing for the business of the court in question upon a footing which will, for a period which may possibly extend over several months, expose litigants to the risk of being saddled with the expense of an unnecessary appeal. It may well be described as being especially inopportune at the present time, when legal reforms are being so much discussed, and when the lay press is clamouring for a reduction in the number of appeals now allowed by our existing system of judicature.

*THE INDUSTRIAL DISPUTES INVESTIGATION ACT,
1907.*

REX v. McGUIRE.

The Act above referred to is the most recent, and certainly not the least important of the statutes passed by the Dominion Parliament with the praiseworthy object of promoting the cause of peace in the constantly recurring conflict between capital and labour, and of removing or alleviating the many evils that follow in its train. It may not be without interest to refer briefly to the previous legislation passed with a similar object, especially as the Act now in question owes its origin to defects which were found to exist in the earlier statutes, and to interfere materially with the attainment of the end which they had in view. The principal measures of this kind are the Conciliation Act, 1900, and the Railway Labour Disputes Act, 1903, both of which are now incorporated in the Conciliation and Labour Act, R.S.C. 1906, c. 96.

It is unnecessary for our present purpose to refer to the provisions of the Act of 1903, further than to say that it introduced to a limited extent the element of compulsion which was

altogether absent from the earlier enactment, by giving the power to compel the investigation of causes of difference under oath. This power, however, could only be exercised in the case of disputes between railway employers and employees; and, as regards all other kinds of labour, the provisions of the Act of 1900 alone were applicable.

By these, machinery was provided whereby the Government, in case any dispute existed or was apprehended between employers and workmen, could inquire into the causes of the trouble, and promote an amicable settlement by getting the "parties together, and if either party desired it, by appointing a conciliator," the general nature of whose duties is indicated by his title, including such functions as the "endeavouring to allay distrust, to remove causes of friction, to promote good feeling, etc."

The provisions of this statute were made use of in a number of cases, with very beneficial results, but it was subject to a serious defect in that it provided no means by which the warring interests could be compelled to desist from aggressive measures, such as strikes and lockouts, before the appointment of a conciliator, or even while he was engaged in waving the olive branch. The result, too frequently, was that before his services were invoked, hostilities had been precipitated by one party or the other, and the feelings of both became so embittered that conciliation as a voluntary measure was the last thing they thought of. Much individual distress and public inconvenience resulted from this state of affairs, and at last a peculiarly flagrant example of these evils made the urgent need of a remedy abundantly clear.

We, in Ontario, fortunately, do not know by experience what a real "fuel famine" means, but everyone must remember how narrowly such a catastrophe was averted in the Province of Saskatchewan at the close of 1906, when, on account of a long continued strike among the coal miners at Lethbridge, the settlers throughout large districts were forced, in the complete absence of other fuel, to burn "lumber at \$30 a thousand, willow bramble, twisted hay and grain," and while these sources

were almost exhausted, November blizzards were blowing with zero weather. While matters were in this critical condition, the contending parties were at last induced to avail themselves of the provisions of the Act of 1900, with the result that a friendly settlement was arrived at just in time to prevent complete disaster.

We have referred at some length to the Lethbridge strike, because it was apparently the cause of the legislation which is the subject of the present article.

It was felt that while, in that case, the worst evils of the strike had been averted for the time being, through the agency of the Act of 1900, yet there was need for some more drastic remedy than that measure provided. This is clearly stated in the report presented to the Ottawa Government by Mr. Mackenzie King, the energetic deputy minister of labour whose efforts as a "conciliator" under the Act had been largely instrumental in bringing about the settlement. He there suggests that "the State would be justified in enacting any measure which will make the strike or lockout in a coal mine a thing of the past," and that such an end might be achieved by providing that "all questions in dispute might be referred to a Board empowered to conduct an investigation under oath," and that "pending the investigation and until the Board has issued its finding the parties be restrained, on pain of penalty, from declaring a lockout or strike."

No time was lost by the Government in acting upon this recommendation, and within three months from the settlement of the coal strike, an Act was passed, the full title of which is "An Act to aid in the prevention and settlement of strikes and lockouts in mines and industries connected with public utilities."

This is the Act to which we have thought it desirable to call the attention of our readers, both as being interesting in itself, and also in view of the important question as to its construction, which was raised in the case of *Rex v. McGuire*, recently decided by a Divisional Court.

The defendant in this case was convicted by the police magis-

trate of Cobalt on a charge of unlawfully inciting the employees of a mining company to go on strike, at a time when neither party to the dispute had asked for the application of the provisions of the Act. Against this conviction the defendant appealed to the Divisional Court before which his counsel argued at great length and with great ingenuity, that the magistrate had no jurisdiction to try the case under the Act, as it had not been invoked by either the mine owners or the workmen. It is quite obvious, that if this contention had prevailed, it would be possible for the contending parties to push their quarrel to the last extremity so long as both concurred in neglecting to avail themselves of the provisions of the Act.

The 60th section under which the conviction was made, provides that any person who incites any employee to go or continue on strike "contrary to the provisions of this Act," shall be guilty of an offence and liable to a fine. The interpretation of this section involves the question of what is meant by "going on strike contrary to the provisions" of the Act, and in this connection it was necessary to consider section 56, the true construction of which is the point on which the decision in this case principally turned. That section declares that "it shall be unlawful for any employer to declare or cause a lockout, or for any employee to go on strike, on account of any dispute prior to or during a reference of such dispute to a Board of Conciliation and Investigation under the provisions" of the Act. The "man on the street" would probably think that this language indicates, with sufficient clearness, that no lockout or strike could be lawfully declared until after recourse to the means of conciliation provided by the Act, and there can be no doubt that one of its objects would have been defeated if a contrary construction had been adopted by the Court. This, however, it refuses to do, and the conviction in its essential points was confirmed.

The following quotation from the judgment of Mr. Justice Magee well states the reasons which make the decision a satisfactory one from the point of view of the framers of the Act and of the general public. "The limited class of industries to

which the Act applies affords the strongest indication of the purpose of Parliament and the strongest reason why there should be no interruption of the work. They are 'mining properties' and 'agencies of public service utility.' As regards the latter, upon which the community depends for daily and constant necessary service the public interest in, and need for, their unbroken operation is manifest. As regards coal mines, apart from damage to the same, the loss and privation which may result to manufacturers and consumers at large through wide sections from a general interruption of production is matter of recent history and common knowledge. Parliament has seen fit, doubtless for good reasons, some of which readily occur to one, to include silver and other mines in the same category in this Act, and they cannot be separated in interpreting it."

THE CRIME OF PERJURY.

When speaking recently of the crime of perjury and its prevalence, we were aware that some of our judges at least in the Province of Ontario, are fully alive to the present condition of things in that regard. For example, in the case of *McCullough v. Hughes*, tried at Barrie in October last, Mr. Justice Riddell recommended the prosecution of a witness, who was subsequently convicted of perjury on two counts, before the county judge. At the Sandwich assizes in the same month, three witnesses were, upon the direction of the same judge under R.S.C. 1906, c. 146, s. 870, indicted for perjury, and a true bill found. His practice in regard to the matter is also referred to in *Hall v. Berry*, not reported, where he says that if he found that a witness had committed perjury in a case before him, he would have directed a prosecution as he had done in other cases. In another case he says: "The crime of perjury seems to be alarmingly on the increase, and all legitimate means should be taken to punish it, and thereby prevent its repetition." Other judges have also brought crimes of this character to the attention of the Crown authorities, and recommended prosecutions, and in their charges to the grand juries have called attention to the evil.

But whilst all this is true, it still continues, and the remedy has not yet been found. All our judges should be vigilant and aggressive in this matter. A systematic and consistent use of the powers given by the enactment quoted above might be largely effective. The responsibility at least is on them to do what they can.

CANADIAN EDITION OF THEOBALD ON WILLS.

Of the making of books there is no end; and this applies, measurably, to legal text-books; so much so that it is only occasionally that space permits for more than a passing reference to those which stand out prominently as demanding special attention. Such a one is the volume above referred to.

It is unnecessary to refer to the excellence of Mr. Theobald's most useful book, which in three years has reached another edition. So far as the English edition is concerned, few changes have been made; but a new, and to the Canadian profession an important departure, has been made by the addition to Mr. Theobald's standard work of Mr. Armour's notes on Canadian cases; so that now it may be said that the whole law affecting wills, as laid down in England and Canada, is comprised in the volume before us, which is an unusually large one of about 1,300 pages, inclusive of 300 pages of Canadian notes.

The Canadian authorities referred to by Mr. Armour are about eight hundred in number, and their arrangement follows as far as possible Mr. Theobald's method of dividing the subject, and are appended to each chapter of his work, so that the law affecting the various branches of the subject is to be readily found, and makes a complete whole. Mr. Armour's notes include our statutes, and all the cases in the concluded volumes of reports for the Provinces of Ontario, Nova Scotia, New Brunswick, Manitoba and British Columbia, are noted. In this connection it will be remembered that the same legislation as to wills prevails in all these provinces.

The arrangement adopted has the additional advantage that

it enables the reader to compare and contrast the English and Canadian cases on any particular branch as they are to be found in the same chapter.

For greater convenience there is a separate index and table of cases of the Canadian notes so that we have in effect a scientific digest of all the authorities reported in the various provinces above referred to.

It will therefore be readily seen what a complete and useful work we now have on this most important subject. The material is all there, and we can well be satisfied that such learned lawyers, such accurate writers and such experienced authors as Mr. Theobald and Mr. Armour have not, in this instance, failed in the excellence of their work.

An examination of the volume before us leads us to hope that in future editions of other standard English text-books, others may follow the example thus set by Mr. Armour.

DEFAULT IN CONTRACTS.

The recent decision of the Divisional Court in *Labelle v. O'Connor*, 15 O.L.R. 519, is an instance of a Divisional Court not following the decision of the Court of Appeal notwithstanding the Judicature Act, s. 81. In *Labelle v. O'Connor*, the court decided that where a purchaser makes default in a contract for the sale of land, in which time has been made of the essence of the contract, though he forfeits his deposit, he does not forfeit other payments which have been made on account of the purchase money. In *Fraser v. Ryan*, 24 A.R. 441, the Court of Appeal held that the forfeiture extended to all payments which had been made on account of purchase money, and this was followed by Street, J., in *Gibbons v. Cozens*, 29 Ont. 356. These cases, however, seem to have escaped the notice of the court in *Labelle v. O'Connor*.

THE MAXIM THAT THE LAW DOES NOT REQUIRE IMPOSSIBILITIES.

The Most Usual Mode of Expressing the Maxim.—It is an ancient and familiar maxim of the law which is embodied in the Latin phraseology, *Lex non cogit ad impossibilia*.

Literally, the maxim would mean that the law does not coerce to impossibilities, or compel impossibilities. Here there are certain words to be understood. It is not the impossibilities which the law fails to compel, but the doing or performing of impossibilities. As a matter of fact, however, the law not only does not but cannot compel "impossibilities," where they are such in the strict sense of that term. It could order the performance of such impossibilities, but could not enforce its order. The translation of the maxim is therefore more properly put in the form, which is usually adopted, that the law does not require impossibilities.

"The law never requires impossibilities" is the phraseology used in the statutes of some of the states.

Various Forms of the Maxim.—Sometimes the words of the maxim are put in a different order, so as to read *Ad impossibilia lex non cogit*.

The maxim is also sometimes mentioned in a way which while keeping the sense, leaves out the negative word in the Latin.

So the maxim is sometimes made to denote that the law compels "no one" to impossible things, by being put in the form, *Lex neminem cogit ad impossibilia*.

The familiar maxim on the subject is also put in the form which indicates that the law does not "intend" anything impossible, or in the Latin phraseology, *Lex non intendit aliquid impossibile*.

What may be regarded as practically a variation of the same maxim is found in the Latin words, *Impotentia excusat legem*, or literally, Impotence excuses law, which may be freely translated, Want of power is an excuse in law. This form of the maxim is especially invoked in regard to tenancy by curtesy,

where entry by the husband to give seisin is precluded during the lifetime of the wife.

Three other modes of expression may also be viewed as variations of the maxim, or at any rate as embodying like ideas. One of these, declaring that An impossibility involves no obligation is in the Latin form, *Impossibilium nulla obligatio est*. Literally, An impossible thing is no obligation. Another insists that No one is bound to do an impossibility, or, in the Latin form, *Nemo tenetur ad impossibile*.

The third declares, in antique language, that the law respecteth the possibility of things.

Sources of the Maxim.—The first appearance of the maxim under consideration in the English reports seems to be in a case decided in 1610 and preserved in Hobart's Reports, which were printed in 1646. The maxim there appears with the omission of the word "ad" (to) before "impossibilia" and in combination with that other form of the maxim "*Impotentia excusat legem*." The latter form is preceded by the Latin word for "but," ("sed") and so given as a species of equivalent for the maxim in its first form.

The form of the maxim, *Lex non intendit aliquid impossibile*, appears in a matter which came up two years later, in 1612, as described in Coke's Reports of which the thirteen parts or volumes were published between 1600 and 1615.

The source most usually assigned to the maxim in its most familiar form is, however, Coke upon Littleton, forming the first part of Coke's Institutes, and of which the fourth edition appeared in 1639. Here the maxim appears in its ordinary phraseology, preceded by the Latin word for "since" ("quia").

The variation or equivalent of the maxim in the phraseology, *Nemo tenetur ad impossibile*, appears in a source later than most if not all of these authorities. This is Jenkins' Reports, or Centuries, as he terms them and as they are sometimes cited, because they comprised Eight "Centuries" of cases, or eight hundred cases. These were compiled during the reign of

Charles I., who, it will be remembered, came to the throne in 1625.

Can the Maxim be Traced to the Influence of the Ancient Roman Law?—But if we seek beyond the English law for sources of the maxim, we might possibly trace its origin to the form or variation *Impossibilium nulla obligatio est*, known to the ancient imperial Roman law. It may not, however, be recognized as a maxim under that name, since the term maxim was not used by those old jurists. But it appears as a mode of expression such as was usually designated as a rule or *Regula*.

We find, indeed, many illustrations of impossible stipulations or promises given by Justinian in his Digest, as well as some in his Institutes and in those of Gaius. Among these instances are those where a person stipulates that some thing shall be given him which in the nature of things, does not exist or cannot exist, as a freeman he believed to be a slave, a sacred or devoted spot he thought subject to man's law, or a fabled creature that cannot exist.

When, however, the expression under consideration is rendered by the words, "An impossibility creates no obligation," it is to be recalled that the word "obligation," as used by the Roman jurists, has an implication of a binding legal tie, or connecting element, such as it does not strictly have in English law.

The ancient Roman law likewise defined and dealt with impossible conditions. Justinian in his Institutes explains that if an impossible condition be annexed to a stipulation, the stipulation is of no avail.

It will thus be seen that the ancient Roman law dealt sufficiently and with enough conciseness of statement with impossibility to give plausibility, at least, to the suggestion that the influence of that law may have been felt in the framing of the maxim under consideration. A species of further support to this idea may be regarded as derivable from the fact that even those writers most inclined to minimize the influence of the Roman upon the English law, and to claim that such vogue as that law may, at one time, have had, was academic rather than

professional, acknowledge a certain superficial currency of the leading rules or maxims of the Roman law among the early English lawyers.—*Central Law Journal*.

The subject is not one of much practical interest, in this country at least, but it may be noted that the Bar Council of England has adopted a resolution that the answering of legal questions in newspapers or periodicals, at a salary, or at ordinary literary remuneration, is not contrary to professional etiquette, provided that the name of the barrister giving the answer is not disclosed to the public, nor directly or indirectly brought to the knowledge of the person asking the question. A contemporary says that this seems a sensible compromise of a matter, as to which there has been wide divergence of opinion in the old country.

A man was convicted and sentenced for the crime of obtaining money by false pretences in the United States Court in China, which was created by Act of June 30, 1906. The court has jurisdiction over offences against the laws of the United States, and when these are deficient to furnish suitable remedies, in accordance with the common law, it was held that 30 Geo. II. (1757), making this act a crime having been passed prior to the separation of this country from England, it is an offence at common law within the meaning of the Act of 1906. *Biddle v. U. S.*, 156 Fed., 759.

In several states, English statutes passed prior to July 4, 1776, have been held to be in force.

In other states, only statutes passed prior to 4 James I. (1607) are considered as part of the common law. 6 Am. & Eng. Encyc., 278 (2nd ed.).—*U.S. Exchange*.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

PRACTICE—ACTION BROUGHT BY WRONG PERSON—ADDING ATTORNEY-GENERAL AS PLAINTIFF—AMENDMENT—TERMS OF AMENDMENT—COSTS.

Attorney-General v. Pontypridd Waterworks Co. (1908) 1 Ch. 388. This action was originally commenced by a municipal body for a mandatory injunction to enforce the provisions of an Act of Parliament. It was objected by the defendants that the statement of claim disclosed no cause of action. Thereupon the plaintiff obtained leave to amend the writ and statement of claim by adding the Attorney-General as a co-plaintiff, and the question was reserved as to the terms on which the amendment should be allowed to be disposed of by the judge at the trial. Warrington, J., held that the original plaintiffs had no right of action, and that the terms on which the Attorney-General should be added were first that the plaintiffs should pay all costs up to the order adding him, and that the Attorney-General should only be entitled to such relief as he could have claimed if the action had been commenced at the date on which he was added as a party.

POWER—APPOINTMENT BY WILL—TESTAMENTARY DOCUMENT NOT PROVABLE AS A WILL—INVALID EXECUTION OF POWER—WILLS ACT, 1837 (1 VICT. c. 26) SS. 1; 9, 10—(R.S.O. c. 128, s. 13.)

In re Barnett, Dawes v. Izer (1908) 1 Ch. 402 is a singular case because Warrington, J., as judge in deciding it refused to follow a decision which he himself, as counsel for the plaintiff, had persuaded the late Mr. Justice Kekewich to give *In re Broad* (1901) 2 Ch. 86. The question in both cases was whether a power to appoint by will is well executed by a document, which, though purporting to be a will, and an exercise of the power, is nevertheless unprovable as a will by reason of defect of execution, or other cause. Kekewich, J., had held that it was a good execution of the power, but Warrington, J., holds that that decision is clearly contrary to the express provisions of the Wills Act, s. 10 (R.S.O. c. 128, s. 13) and he therefore declined to follow it. He naively suggests that counsel and the judge must have forgotten that section when *Re Broad* was argued.

POWER OF APPOINTMENT—PARTIAL EXERCISE OF POWER—EXTENSION OF RANGE OF INVESTMENT BY DONEE OF POWER—INVALIDITY.

In re Falconer, Property and Estates Co. v. Frost (1908) 1 Ch. 410. In this case a wife had, under her husband's will, power of appointment over trust property in favour of her children. She made partial appointments in favour of some of the children; and without making any appointment in favour of the others, she purported to authorize the trustees to invest the trust fund in other investments than were authorized by the will, including mortgages of leaseholds. The trustees made such investments, but Warrington, J., held that they had no power to invest upon leasehold security any funds representing shares subject to the trusts of the will and passing in default of appointment.

MARRIED WOMAN—RESTRAINT ON ANTICIPATION—COVENANT NOT TO SUE.

Sprange v. Lee (1908) 1 Ch. 424 is one of those cases which illustrate the peculiar result of a restraint against anticipation by a married woman. In this case a separation deed was made between husband and wife whereby the husband covenanted to pay £1,000 to a trustee upon trust to pay the income to the wife and to pay him a further annual sum for her separate use without power of anticipation. Subsequently the husband commenced divorce proceedings, which were compromised, the wife purporting to release the husband from his covenant to pay the further annual sum. This release, however, by reason of the restraint against anticipation was void; the wife, however, covenanted not to sue for any additional income or support beyond the income of the £1,000. This was paid to and accepted by her during her life. She died bequeathing her property to an adopted daughter, and her legal personal representative brought the present action to recover the arrears of the annuity on the ground of the nullity of the release given by the wife. The husband counterclaimed for damages for breach of covenant of the wife not to sue and Neville, J., held that both plaintiff and defendant were entitled to succeed on their claim and counterclaim respectively, and he therefore made no order except that the plaintiff should pay the costs of the action and counterclaim.

COPYRIGHT—ASSIGNMENT TO INTENDED COMPANY—REGISTRATION—VALIDITY OF ASSIGNMENT—GOODS IMPORTED TO SUPPLY ORDER GIVEN BEFORE REGISTRATION—INFRINGEMENT—FINE ARTS COPYRIGHT ACT 1862 (25 & 26 VICT. c. 68) ss. 1, 4, 9, 11.

Millar v. Polak (1908) 1 Ch. 433 was an action to restrain the infringement of a copyright. The author of drawings and designs for Christmas cards in February, 1905, agreed with the trustee of an intended company to be called M. & L, to sell the drawings and designs to the company when formed, and on March 1, 1905, executed an assignment thereof to the M. & L. company. On March 3, 1905, the company was incorporated and afterwards executed the usual adoptive agreement. In September, 1906, the company registered the drawings and designs which had been so assigned under the Fine Arts Copyright Act, 1862, and entered on the register March 1, as the date of the assignment to the company. The defendants, subsequent to September, 1906, imported into England infringements in fulfilment of orders given prior to the registration. Neville, J., who tried the action, held that the drawings or designs were proper subject matter for registration as drawings under the Act of 1862, and that the copyright extended to the right of multiplying copies, or reproductions of, by engravings thereof, be also held that the date of the assignment was properly stated as March 1, 1905, notwithstanding the company had not, on that date, been incorporated. Also, that it was an infringement of the copyright to import the copies above mentioned after registration, even though the importation was in fulfilment of an order given prior to the registration of the copyright.

INTERNATIONAL COPYRIGHT—FOREIGN MUSICAL COMPOSITION—REGISTRATION—UNAUTHORIZED PERFORMANCE IN ENGLAND—‘WILFULLY’ CAUSING OR PERMITTING UNAUTHORIZED PERFORMANCE—COPYRIGHT ACT, 1842 (5-6 VICT. c. 45)—INTERNATIONAL COPYRIGHT ACT, 1844 (7-8 VICT. c. 12)—MUSICAL COMPOSITIONS ACT, 1882 (45-46 VICT. c. 40)—INTERNATIONAL COPYRIGHT ACT (49-50 VICT. c. 40)—BERNE CONVENTION, 1887, ARTS, 2, 11—MUSICAL COPYRIGHT ACT, 1888 (51-52 VICT. c. 17) s. 3.

Sarpy v. Holland (1908) 1 Ch. 443. In this case a copyright in a musical composition was claimed under the International

Copyright Act, 1844, and one question was whether registration was necessary. It had not been registered as required by the Act of 1842, and Neville, J., held that the registration required by the Act of 1844 is in substitution for and not in addition to the registration required by the Act of 1842, and as the proprietor had been relieved by virtue of the International Copyright Act of 1886 (49-50 Vict. c. 33) ss. 4, 6, and the Berne Convention, 1887, and the Orders in Council adopting the same, from registration under the Act of 1844, no registration under the Act of 1842 was necessary. But he also held that the proprietor of such a copyright desiring to retain it in force in England must on the title page of every copy published in England print in English the notice reserving such right required by the Musical Compositions Act of 1882 (45-46 Vict. c. 40) s. 1. He also held that when a proprietor, tenant or occupier of a place of entertainment, at which an unauthorized performance of a copyright musical composition takes place, does not "wilfully cause or permit such unauthorized performance knowing it to be unauthorized," he is, by virtue of the Musical Compositor's Act, 1888 (51 and 52 Vict. c. 17) s. 3, relieved from liability to any penalty or damages in respect thereof, and in such cases an injunction will not be granted unless he threatens and intends to continue the performance. In this case the defendant, a hotel keeper, had hired musicians to play at his hotel, leaving it to their discretion what to play, and without his knowledge they performed a piece which was subject to copyright, and on his attention being called to the fact, he forbade the further performance of it. The plaintiff, moreover, failed to support his copyright because the publications of his composition in England bore only a notice in French reserving his rights.

MUNICIPAL CORPORATION—COUNCIL MEETINGS—RIGHT OF PUBLIC
—NEWSPAPER REPORTER—EXCLUSION OF PUBLIC FROM MEETING OF COUNCIL.

Tenby v. Mason (1908) 1 Ch. 457. This was an action brought by the municipal corporation of the Town of Tenby against the defendant, a newspaper proprietor and ratepayer and burgess of the town, to restrain him from being present at council meetings without the permission of the council. The plaintiffs had passed a resolution excluding reporters, but the defendant had attended a meeting in that capacity and refused to leave when required so to do. The defendant claimed the

right to be present without such permission. The late Mr. Justice Kekewich, who tried the action, held that he had no such right, and granted an injunction and condemned the defendant in costs, and the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) affirmed his decision, holding that there is no inherent right on the part of the public to attend the deliberations of a public representative body, and that in the absence of any statutory enactment to the contrary, it is competent for any such body to exercise its discretion as to the admission or exclusion of the public.

Correspondence.

TO THE EDITOR, *Canada Law Journal*:

DEAR SIR:—

The dignified course adopted by Mr. Justice Cassels in reference to his appointment by the Dominion Government to investigate the charges against the management of one of the Public Departments at Ottawa is one which it is to be hoped may hereafter be generally adopted by the judiciary of the Dominion. We may reasonably expect that the conclusions at which the learned judge may arrive on the matters submitted for inquiry by him will be received by the public as a judicial utterance, and that the tongue of calumny, which is ever ready to wag on the slightest pretence, will be silenced.

There will at least be no pretence for saying that the learned judge has been influenced in his conclusions by any pecuniary gain, or by the hope of getting further extra judicial jobs of the like nature.

READER.

•We refer to this matter in our editorial columns.—Ed. *C.L.J.*

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] INVERNESS RY. CO. v. JONES. [March 23.

Maritime law—Material men—Supplies furnished for “last voyage”—Privilege of dernier équipieur—Round voyage—Charter-party—Personal debts of hirers—Seizure of ship—Construction of statute—Ordonnances de la Marine, 1681.

A steamship lying at the port of Liverpool was chartered by the owners to P. for six months, for voyages between certain European ports and Canada, the hirers to bear all expenses of navigation and upkeep until she was returned to the owners. The ship was delivered to the hirers at Rotterdam, where she took on cargo and sailed for Montreal. On arriving at Montreal she unloaded and re-loaded for a voyage to Rotterdam, with the intention of returning to Montreal, and obtained a supply of coal from the plaintiffs which was furnished on the order of the hirers' agent at Montreal. The ship sailed to Rotterdam and returned to Montreal in about one month touching at Havre and Quebec, discharged her cargo and proceeded to re-load, obtaining another supply of coal from the plaintiffs in the same manner as the first supply had been furnished. Within a few days, the price of these supplies of coal being still owing and unpaid, the hirers became insolvent, and the plaintiffs arrested the ship at Montreal, claiming special privilege upon her as derniers équipieurs in furnishing the first supply of coal on her last round voyage, the right of attachment before judgment in respect of both supplies, and seizing her under the provisions of articles 2391 of the Civil Code and 931 of the Code of Civil Procedure.

Held, per FITZPATRICK, C.J., and DAVIES, MACLENNAN and DUFF, JJ., that the voyage from Montreal to Rotterdam and return was not the ship's "last voyage" within the meaning of article 2383(5) of the Civil Code; that the voyage out from Montreal and that returning from Rotterdam did not constitute one round voyage but were separate and complete voyages, and that, consequently, there was no privilege upon the ship for the

supply of coal furnished from Montreal to Rotterdam. And also, that the provisions of article 2391 of the Civil Code did not render the ship liable to seizure for personal debts of the hirers, and, consequently, that she could not be attached therefor by saisie-arrêt. Judgment appealed from (Q.R. 16 K.B. 16) affirmed, GIROUARD, J., dissenting.

Per DAVIES, J.:—The “last voyage” mentioned in article 2383 Civil Code, refers only to a voyage ending in the Province of Quebec.

Per IDINGTON, J.:—As the terms of the charter-party expressly excluded authority in the hirers to bind the ship for any expenses of supply and as nothing arose later that could by any implication of law confer any such authority on anyone and especially so in a port where the owners had their own agents, any possible rights that might in a proper case arise under article 2383 of the Civil Code did not so arise here; and, therefore, though agreeing in the result he expressed no opinion on the meaning of the term “last voyage” therein. *Lloyd v. Guibert*, L.R. 1 Q.B. 115, should govern this case.

Casgrain, K.C., for appellants. *MacMaster*, K.C., and *Hickson*, for respondent.

N.S.]

CHISHOLM v. CHISHOLM.

[March 23.

Mother and child—Guardian—Transfer of guardianship—Agreement—Family arrangement—Public policy.

Where a widow, whose husband left no estate, agreed to give up her natural rights of guardianship over her young daughter and transfer the same to the latter's grandfather, who, on his part, agreed to educate the child, provide for her afterwards, and allow as full intercourse as possible between her and her mother, the fact that the arrangement included an allowance to the mother for her maintenance did not necessarily make it void as against public policy. *IDINGTON* and *DUFF*, JJ., dissenting.

Appeal dismissed with costs.

Wallace Nesbitt, K.C., for appellant. *Harris*, K.C., for respondent.

Que.]

[March 23.]

HETU v. DIXVILLE BUTTER AND CHEESE ASSOCIATION.

Malicious prosecution—Reasonable and probable cause—Bona fide belief in guilt—Burden of proof—Right of action for damages.

An action for damages for malicious prosecution will not lie where it appears that the circumstances under which the information was laid were such as might lead to an honest belief in the guilt of the person accused. *Abrath v. North Eastern Railway Co.* (11 App. Cas. 247) and *Cox v. English, Scottish and Australian Bank* ((1905) A.C. 168), referred to.

Semble, that in such cases, the rule as to the burden of proof in the Province of Quebec is the same as that under the law of England, and the plaintiff is obliged to allege and prove that the prosecutor acted with malicious intentions or, at least, with indiscretion or reprehensible want of consideration. *Sharpe v. Willis*, Q.R. 29 S.C. 148, 11 Rev. de Jur. 538, and *Durocher v. Bradford*, 13 R.L. (N.S.) 71, disapproved.

Judgment appealed from, Q.R. 16 K.B. 333, affirmed.

Belanger, K.C., and *Verret*, for appellant. *Shurtleff*, K.C., for respondents.

B.C.]

HUTCHINSON v. FLEMING.

[March 23.]

Principal and agent—Secret profit—Trust—Clandestine transactions by broker—Sham purchaser—Commission.

H., a broker, undertook to obtain two lots for F., as an investment of funds supplied by F. for that purpose, at prices quoted, and on the understanding that any commission or brokerage chargeable was to be got out of the vendors. H. purchased one of the lots at a price lower than that quoted, receiving, however, the full amount quoted from F., and by representing a sham purchase of the other lot, got an advance from F. in order to secure it.

Held, affirming the judgment appealed from, that H. was the agent of F. and could not make any secret profits out of the transactions, nor was he entitled to any allowance by way of commission or brokerage in respect of either of the lots so purchased.

W. S. Deacon, for appellant. *D. G. Macdonnell*, for respondent.

Ex. Court.]

[March 23.

MONTREAL TRANSPORTATION CO. v. NEW ONTARIO STEAMSHIP CO.

Admiralty — Preliminary Act — Amendment — Collision — Evidence.

In an action in the Admiralty Court claiming damages for injury to plaintiff's ship "Neepewah" through collision with that of defendants, the "Westmount," the preliminary act stated that the port quarter of the latter struck the stern of the "Neepewah" which was substantially repeated in the statement of claim. The judge held that it was proved that the collision occurred by the sterns of the two ships coming together and, by his judgment, without request from plaintiff's counsel, and in spite of objections by defendant's counsel, allowed the statement of claim to be amended accordingly, stating that the admission of the evidence had not been objected to and the defendants would not be prejudiced.

Held, 1. Such amendment should not have been made; that the objection to the admission of evidence was taken at the trial; and that the amendment presented a new case and different from the one raised by the preliminary act and statement of claim and greatly prejudiced the defence.

2. Errors in the preliminary act may be corrected by the pleadings, but if not, the parties must be held most strongly to what is set forth in the Act.

Per DAVIES, MACLENNAN and DUFF, JJ., that the plaintiffs had not proved that the collision, even under the amended statement, had actually occurred.

Per FITZPATRICK, C.J., that the evidence shewed that no collision had taken place.

Appeal allowed with costs.

Geo. F. Henderson, K.C., for appellants. Lynch-Staunton, K.C., for respondents.

Province of Ontario.

COURT OF APPEAL.

Moss, C.J.O.]

[March 23.

WHITEMAN v. HAMILTON STEEL & IRON CO.

Appeal to Court of Appeal—Judgment at trial affirmed by Divisional Court—Security for costs—Application to dispense with or reduce—Poverty of applicant.

Section 76 of the Ontario Judicature Act, as amended by 4 Edw. VII. c. 11, s. 2(O.) (Con. Rule 826 being to the same

effect) provides that subject to rules of court, on appeal from a Divisional Court . . . security, unless otherwise ordered by the Court of Appeal, shall be given for the costs of appeal.

In an action for damages under the Fatal Injuries Act, the trial judge, being of opinion that there was no evidence to submit to the jury, dismissed the action; but directed the jury to assess the damages, which they did at \$3,500, in case it should be held on appeal that there was such evidence; and on appeal to a Divisional Court, the trial judge's finding was affirmed.

An application to a judge of the Court of Appeal, on the ground of the alleged poverty of the appellant, to dispense with or reduce the amount of security for costs of an appeal to the Court of Appeal was, under the circumstances, refused.

A. M. Lewis, for plaintiff. *W. L. Ross*, for defendants.

HIGH COURT OF JUSTICE.

Boyd, C.] ROBERTSON *v.* ROBERTSON. [March 31.

*Foreign judgment—Alimony—Arrears—Writ of summons—
Special endorsement—Summary judgment.*

An action lies for arrears of alimony past due upon a foreign judgment, and the claim therefor may be the subject of a special endorsement of the writ of summons under Con. Rule 138 and of a motion for summary judgment under Con. Rule 603. *Swaizie v. Swaizie* (1899) 31 O.R. 324 applied and followed. Decision of the Master in Chambers affirmed.

A. R. Clute, for plaintiff. *Hellmuth, K.C.*, and *Hassard*, for defendant.

Boyd, C.] RE REITH *v.* REITH. [April 1.

*Surrogate Courts—Removal of cause into High Court—Will—
Undue influence—Value of estate—Importance of issues.*

Upon an application under s. 34 of the Surrogate Courts Act to remove a cause from a Surrogate Court into the High Court, the importance of the case and its nature are not to be tried on counter-affidavits; it is enough if it appears from the

nature of the contest and the magnitude of the estate that the higher court should be the forum of trial. Much is left to the discretion of the High Court judge as to the disposal of each application.

And where the contest was over the will of a widow, whose husband died in 1905, leaving to her an estate valued at over \$27,000, which had shrunk at her death in 1907 to \$5,850, and the allegation was that she had not been able to protect herself against the undue influence of the chief beneficiaries, her two sons, to whom it was said a large part of her husband's estate had been transferred in her lifetime, an order was made for the removal of the cause into the High Court.

McLean Macdonell, K.C., Hughson, Harcourt, K.C., and Grayson Smith, for the various parties.

Boyd, C.]

RE HUDSON.

[April 3.

Will—Construction—Gift of whole estate—Incomplete enumeration—"Appurtenances"—Farm stock and implements—"Household goods"—Money—Intestacy.

A testator by his will, after directing payment of debts, etc., proceeded: "I give, devise and bequeath all my real and personal estate which I may die possessed of or interested in, in the manner following, that is to say: I give, devise and bequeath to my son W. my farm . . . which is my present residence, and all appurtenances connected therewith, with all my household goods of which I may die possessed:" and appointed an executor.

Held, that all the testator's estate, including money, farm stock, and farm implements, passed by the will to the son named.

Middleton, K.C., Sinclair and A. B. Macdonald, for the various parties.

The executor did not appear.

Falconbridge, C.J.K.B., Britton, J. Clute, J.]

[April 3.

WHALEN v. WATTIE.

Appeal to Divisional Court—Division Court appeal—Amendment—Filing certified copy of proceedings—Extension of time for—Jurisdiction.

A Divisional Court of the High Court, which is the court for hearing Division Court appeals, has no power to extend the

time limited by s. 158 of the Division Courts Act for filing the certified copy of the proceedings in the Division Court, and has no power, under sub-s. 2 of s. 158 (as added by 4 Edw. VII. c. 12, s. 2) or otherwise, to extend the time for setting down the appeal until it is seised of the appeal by the filing of the certified copy, the time for filing which may be extended by the judge in the Division Court.

R. U. McPherson, for defendant. *A. J. Thomson*, for plaintiff.

SURROGATE COURT—COUNTY OF VICTORIA.

IN RE ESTATE OF W. E. SMITH.

Succession Duty Act—Benevolent and Provident Society Act—Beneficiary—Certificate.

The estate of the deceased was less than \$10,000, unless there should be added to it the amount of a beneficiary certificate in the Canadian Home Circles, which, however, was payable at the death of the deceased to his nephew.

Held, that the amount of this certificate so payable formed no part of the estate of the deceased, which thus, being under \$10,000, was not liable to succession duty.

[Lindsay, June 11, 1907—McMILLAN Co. J.]

The estate of the deceased came before the judge of the Surrogate Court of the County of Victoria for the passing of accounts, etc., when it appeared that the total amount of the personal estate and effects of the deceased which came into the hands of the executor was in all \$8,727. It appeared also that the deceased at the time of his death held a beneficiary certificate in the Canadian Home Circles of \$3,000, which amount, if added to the above sum, would so increase the estate of the deceased as to make it liable to succession duty.

McDiarmid, for the executor. *Hopkins*, for the Treasury Department.

McMILLAN, Co. J.—Section 4 of the Succession Duty Act states that in determining "dutiable value" the value of the estate shall be taken as of the date of the death of the deceased, allowances to be made as therein mentioned.

I find that the deceased made application to the Home Circles for the insurance of \$3,000 on the tenth of August, 1903, and by said application a certificate was issued made payable to Alexander Smith, the father of the said deceased, and upon the death of his father in or about the year 1905, the said William Edson Smith had a new certificate issued by said order, which directed that any sums becoming payable under such certificate should be paid to Wilbur Milton Smith, nephew of the deceased.

On page 32, s. 2 of the laws of the Home Circles in force at the time this certificate was issued, the benefit may be made payable to a class of persons, a list of which is given; among which class "nephews" are included. Under another section a benefit certificate cannot be made payable to a creditor, nor be held in whole or in part by assigns, to secure any debt, which may be owing by a member. Since issue of the above certificate the constitution and laws of the Home Circles have been amended, but the amendments do not in any way vary the said two sections.

Sec. 12 of the Benevolent and Provident Society Act, R.S.O. c. 211, in my judgment precludes the certificate issued by the Home Circles in this case from being made part of the estate of the said deceased at the time of his death. This section provides that on the death of a member and any sum of money becomes payable, the same shall be paid by the treasurer or other officer of the Society to the person or persons entitled thereto under the rules of the society or shall be applied by the society as may be provided by such rules.

I find that under the rules of the society the amount of the certificate in question herein became payable at the death of the deceased, and was, in my judgment, no part of the estate of the said William Edson Smith. I therefore do not allow any deduction for succession duty, the estate of the deceased in my judgment being under the amount of \$10,000.

Mr. Hopkins, for the Treasury Department, cited *Attorney-General v. Dobree* (1900) 1 Q.B.D. 442, but this case in my judgment does not destroy the effect of the Benevolent and Provident Societies Act, and does not apply to insurance taken under the provision of that Act in Ontario.

DIVISION COURT—COUNTY OF FRONTENAC.

Madden, Co. J.]

[March 18.]

KNOWLES v. BANK OF MONTREAL.

Cheque—Stopping payment—Notice to bank.

Action to recover \$60 damages for wrongfully paying plaintiff's cheque for \$50 after notice of countermand. Shortly before the presentation of the cheque at a branch of the bank, the plaintiff went to one of the ledger-keepers with the intention of countermanding payment of the cheque. He was told that the cheque had not been presented to him to be cashed, whereupon the plaintiff said, "I want to stop the cheque," to which the ledger-keeper replied, "All right." The latter communicated that request to the paying teller in his department. There was some conflict of evidence as to details which, however, is immaterial for the decision.

Held, 1. The countermand was insufficient inasmuch as it was not given to the manager or acting manager of the branch; notice to the ledger-keeper not being sufficient.

2. A notice countermanding payment of a cheque to be effective, must be a written notice. A verbal notice is insufficient, inasmuch as the revocation, or cancellation of the authority to the bank to part with its money must be evidenced in the same way as the authority itself.

Reference was made to *Cohen v. Hale & Midland R. Co.*, 3 Q.B.D. 1878, p. 373, and *Courtice v. London City & Midland Bank*, K.B.D. 1907, Weekly Notes, p. 146.

Province of Manitoba.

COURT OF APPEAL.

Full Court.]

PONTON v. CITY OF WINNIPEG.

[Feb. 29.]

Municipality—Contracts of municipality requiring by-laws—Estoppel by conduct—Winnipeg charters—Meaning of "sufficient evidence" in statute.

Appeal from judgment of MATHERS, J., noted ante, p. 80, dismissed. Since appealed to the Supreme Court of Canada.

Galt and Minty, for plaintiff. *I. Campbell*, K.C., and *Hunt*, for defendants.

Full Court.] *CLAYTON v. CANADIAN NORTHERN RY. CO.* [Feb. 29.

Railway company—Animals killed on track—At large through negligence of owner—Railway Act, R.S.C. 1906, c. 37, ss. 254, 294, 427—Liability to maintain proper fences along right of way.

Appeal from decision of a County Court judge refusing to nonsuit the plaintiff in an action to recover damages for horses killed by a train of the defendants on the right of way, upon which the animals entered through a defective gate opening on a public road. On the morning of the accident plaintiff's agent turned the horses loose in a field from which there was, to the knowledge of both, free access to the road through an opening in the fence left by the removal of a gate.

Held, HOWELL, C.J.A., dissenting, 1. It being clear from the plaintiff's own evidence that the horses "got at large through the negligence or wilful act or omission" of the plaintiff or his agent within the meaning of sub-s. 4 of s. 237 of the Railway Act, 1903 (s. 294 of c. 37 of R.S.C. 1906), the plaintiff could not recover damages by virtue of that sub-section, although the company had failed to observe the requirements of s. 199 (now 254) by neglecting to repair the defective gate in the fence along the right of way. *Murray v. Canadian Pacific Railway*, 7 W.L.R. 50; *Becker v. Canadian Pacific Railway*, 7 Can. Ry. Cas. 29, and *Bourassa v. Canadian Pacific Railway*, 7 Can. Ry. Cas. 41, followed.

2. Section 294 of the Railway Act, 1903 (s. 427 of c. 37, R.S.C. 1906), which provides that, when the railway company does anything contrary to the provisions of the Act or omits to do anything the Act requires it to do, the company is liable to any person injured thereby for the full amount of damages sustained in consequence of such act or omission, does not apply to a case like the present. It is general, whereas s. 237 is special and intended to cover fully all questions of liability in cases of animals at large getting on the railway; and besides, the expression "person injured," may extend only to personal injuries to human beings and not to damages for loss of property.

Appeal allowed with costs and nonsuit entered.

Hough, K.C., for plaintiff. *Clark*, K.C., for defendants.

KING'S BENCH.

Mathers, J.] BENNETTO v. WINNIPEG. [Feb. 28.
*Arbitration—Award not made within the time limited—When
 arbitrator functus officio—Winnipeg charter.*

Motion by the City of Winnipeg for an order prohibiting the County Court judge of Winnipeg from appointing an arbitrator on behalf of the city to determine the compensation payable to Bennetto for lands injuriously affected pursuant to a city by-law.

There had been a previous arbitration to settle the same matter, but the arbitrators had been unable to agree and had allowed the time within which, under sec. 812 of the city charter, they could make an award, to elapse without coming to any decision.

Bennetto now took fresh proceedings, reappointed his arbitrator and served notice on the city, under s. 802 of the charter, to appoint an arbitrator on its behalf. The city having failed to act in the matter, Bennetto gave notice of an application under s. 805 to have the County Court judge appoint an arbitrator on behalf of the city. The prohibition was asked for on the ground that in the former arbitration the city had, by by-law, appointed R. T. Riley as its arbitrator and that said by-law had never been repealed and that Riley was still the city's arbitrator in the matter.

Held, that an arbitrator's authority ceases as soon as he has made an award, or as soon as the time fixed, whether by consent or otherwise, within which he shall make his award, has expired, and that Riley's authority to act under the by-law appointing him had ceased whether that by-law had been repealed or not, and that a new appointment of an arbitrator on behalf of the city was necessary. Russell on Arbitration, 111; 2 Am. & Eng. Enc., 696; 3 Cyc., 631; *Ruthven v. Ruthven*, 8 U.C.R. 12. Application dismissed with costs.

O'Connor and Blackwood, for Bennetto. *Robson and Auld*, for City of Winnipeg.

Macdonald, J.] PATTON v. PIONEER NAVIGATION CO. [March 11.

Injunction—Dredging sand out of bed of navigable river causing subsidence of banks—Riparian owner—Ownership of bed of non-tidal navigable stream.

This action was brought to restrain the defendants from continuing to dredge and remove sand for building purposes from

the bed of the Assiniboine River opposite the plaintiff's property fronting on the river, on the ground that such dredging had already caused the banks to cave in and, if continued, would cause irreparable damage to the plaintiff.

By an amendment of the statement of claim the plaintiff set up that he owned the bed of the river opposite and adjacent to his land to the middle of the river and the sand thereon. The defendants claimed that the river was a navigable stream and that the bed and bottom and the banks thereof, up to the low water mark, were and still are vested in and owned by the Crown in right of the Government of Canada, and that the sand belonged to said Government. It was not disputed that the Assiniboine River, at the place in question, is a navigable stream. The trial judge found as facts that the greater quantity of the sand taken out of the river by the defendants had been carried down the river by the current, but that there was a real danger of the banks being worn away if the dredging operations should be continued, although he was not satisfied that the dredging already done had caused any subsidence of the banks.

Held, that, on these facts, the plaintiff was entitled to an injunction as prayed for.

The plaintiff's title had been derived through the Hudson's Bay Company, by a mere verbal bargain and sale with livery of seisin, prior to the 15th day of July, 1870, when the laws applicable to the transfer of real property were the laws of England as they stood on May 2, 1670, so far as such laws were applicable. The Statute of Frauds had not been passed and such a transfer was sufficient to pass title both at law and in equity. After the transfer of Rupert's Land to Canada, patents were issued confirmatory of the titles granted by the Hudson's Bay Company. The plaintiff's patent described his land as a portion of a parish lot as shewn on a plan of survey of the parish of St. Boniface. According to the plan referred to, the parish lots run only to the Assiniboine River, but the patent contained a reservation of the free use, passage and enjoyment of, in, over and upon all navigable water, etc.

Held, also, that by the laws of England the title to the bed of a non-tidal river is presumed to be in the riparian owner *ad medium filum aquæ*, that the reservation in the plaintiff's patent affords a strong presumption of non-ownership by the Crown in the soil underneath the river, and that the title derived

through the Hudson's Bay Company carried with it all the rights of a riparian owner so that the plaintiffs owned the bed of the river as claimed.

Bickett v. Morris, L.R. 1 H.L. 47; *Keewatin Power Co. v. Town of Kenora*, 11 O.W.R. 266, and *Servos v. Stewart*, 15 O.L.R. 216, followed.

Aikins, K.C., Robson and Coyne, for plaintiffs. *J. Hillyard, Leech and Sutton*, for defendants. *Hudson and Howell*, for Dominion Government.

Mathers, J.] NATIONAL TRUST CO. v. CAMPBELL. [March 17.

Mortgage—Foreclosure—King's Bench Act, R.S.M. 1902, c. 40, Rules 277, 178—Real Property Act, R.S.M. 1902, c. 148, s. 117—Relief on payment of overdue part of mortgage debt, although whole amount payable under acceleration clause in mortgage.

Appeal from the order of the referee, in an action for foreclosure and a personal order for payment, staying proceedings after judgment under Rule 278 of the King's Bench Act, R.S.M. 1902, c. 40, upon payment of the overdue instalment of principal, interest and costs.

Held, 1. The action was one for foreclosure within the meaning of Rules 277 and 278 of the King's Bench Act, although judgment for the amount of the debt was also asked for.

2. A provision in a mortgage that, upon default in payment of an instalment of principal or interest, the whole should become due is not one against which equity will relieve as being in the nature of a penalty. *Sterne v. Beck*, 1 De G. & S. 595; *Bell & Dunn*, p. 80.

3. Although Rule 278 says that proceedings may be stayed in the action after judgment "upon paying into court the amount then due for principal, interest and costs," the relief ordered could not be granted to the defendant under that Rule, because, by virtue of the acceleration clause in the mortgage, the amount then due was the full amount of the principal debt and equity will not relieve against such a provision.

4. The defendant was entitled to the relief ordered by virtue of s. 117 of the Real Property Act which provides that a mortgagor, under the circumstances appearing in this case, may "pay such arrears as may be in default under the mortgage, together with costs to be taxed by the district registrar, and he

shall thereupon be relieved from the consequences of non-payment of so much of the mortgage money as may not then have become due and payable by reason of lapse of time."

5. Section 117 of the Real Property Act, notwithstanding it is preceded and followed by sections relating only to mortgages registered under the new system, is not so limited, but expressly applies to all mortgages including those registered under the old system.

Galt, for plaintiff. *J. F. Fisher*, for defendant.

Macdonald, J.]

VOSPER v. AUBERT.

[March 18.

Contract—Redemption—Relief against acceleration clause in agreement of sale of land—Verbal agreement varying within contract.

By agreement dated June 7, 1906, the plaintiff sold to the defendant 625 acres of land for \$17,500; \$1,000 being payable on the execution of the agreement and the balance in yearly instalments with interest. It was provided that on default in payment of any instalment the whole of the purchase money and interest should at once become due and payable. Owing to some difficulty over the title to the property the agreement was not completed until November 8, 1907, when each party got a duplicate signed by the other and the defendant paid \$957.60 of the \$1,000 payable on the execution of the agreement. On that date there was also past due the second instalment of the purchase money and some taxes which the defendant had covenanted to pay. It was admitted that, prior to the completion of the agreement by delivery, a verbal agreement was arrived at extending the time for payment of the second instalment; but the parties differed as to the terms of this verbal agreement and, as it would contradict the writing, the trial judge held that it should not be given effect to and that the plaintiff was not bound by it. The plaintiff demanded payment of the full amount of the purchase money, claiming that it was due by virtue of the acceleration clause above quoted. The defendant asked, that upon payment of all arrears, he might be relieved from the effect of the acceleration clause.

Held, 1. Such a provision in a contract is not in the nature of a penalty against which equity will relieve. *Wallingford v. Mutual Society*, 5 A.C. 705.

2. The plaintiff, by completing the agreement, waived his right to call in the full balance of the purchase price, because at that date the agreement was, so far as the past due payments were concerned, impossible of performance.

3. For that reason, and also because the plaintiff had made default in carrying out a term of the agreement by which he was to place a mortgage of \$10,000 on the property for a five year term, the defendant was entitled to the relief prayed for.

Robson, for plaintiff. *A. J. Andrews*, for defendant.

Howell, C.J.A.]

REX v. THOMPSON.

[March 24.]

Criminal Code ss. 825, 828—Speedy trial—Right to elect for after true bill found by grand jury.

The accused had been bound over to take their trial at this assizes on the charge of theft, and allowed to remain at liberty by the magistrate. At the next assizes indictments were preferred by the Crown for offences set forth in the dispositions sent in by the magistrate and the grand jury found true bills. The accused then delivered themselves into the custody of the sheriff under sub-s. 4 of s. 825 of the Criminal Code, and the sheriff, under s. 826, took them before a County Court judge when they elected to take a speedy trial for which a term was fixed. Upon being arraigned for trial at the assizes, the accused objected to plead to the indictments under the circumstances.

It was argued on behalf of the Crown that, as the prisoners had not previously elected to take a jury trial, s. 828 could not apply, and that sub-s. 3 of s. 825 did not give the right of election after true bills found.

Held, that the accused had a right to elect as they had done even after true bills found, and that such right was conferred under s. 825 of the Code, although the case was not within s. 828.

King v. Kominsky, 6 C.C.C. 524, distinguished.

Arraignment postponed until the next sittings of the court, when the Crown can have a stay of proceedings entered if the cases shall have been disposed of in the meantime by the County Court judge.

Patterson and *Bonnar*, for the Crown. *Manahon*, for the accused.

Mathers, J.] HAFFNER v. CORDINGLEY. [March 25.
Commission on sale of land—Meaning of words “completion of the sale.”

A dispute having arisen as to the plaintiffs' right to a commission on the sale of certain property belonging to the defendant, the former claiming \$5,000, the latter denying liability for anything, the parties compromised at \$2,000 and the defendant gave the plaintiff a letter which was in part as follows:—"In connection with the sale of (description) from Mrs. Cordingley and myself to John A. Lock et al. I hereby agree that on the completion of the said sale I will pay your firm a commission of \$2,000 . . . This amount to be paid on completion of the deal."

The purchaser had previously made a deposit of \$2,000, but had not signed a formal agreement of purchase. A few days afterwards the formal agreement was executed by all parties and a further payment of \$10,000 made.

The purchaser subsequently made default in payment of further instalments of the purchase money, and the defendant took back the land and released the purchaser from all obligations under the agreement.

The defendants resisted the action for the \$2,000 commission on the ground that the sale had not been "completed" within the meaning of his letter.

Held, that the letter should be interpreted in the sense in which the parties intended the words to be understood at the time, as gathered from the document itself and the surrounding circumstances, and that what the parties meant by the words "completion of the sale" and "completion of the deal" was the execution of a binding agreement of sale.

Munson, K.C., and Haffner, for plaintiffs. A. J. Andrews and Macneill, for defendant.

Province of British Columbia.

COURT OF APPEAL.

Full Court.] [March 31.

ARMSTRONG v. ST. EUGENE MINING COMPANY.

Workmen's Compensation Act, 1902 — Arbitration — Case stated by arbitrator—Referred back by Full Court—Further case stated to single judge—Jurisdiction of judge to entertain and refer back to arbitrator.

On a case stated in an arbitration under the Workmen's Compensation Act, 1902, the Full Court referred the question back to

the arbitrator to make definite findings of fact and have the questions of law clearly formulated. Upon the reference back, the case was re-stated, and the learned judge to whom the questions were submitted found they were questions of fact and referred the matter back to the arbitrator to "proceed with the arbitration."

Held, on appeal, that there was jurisdiction for such an order; that the arbitrator had not finished his work, and that he is not *functus officio* until the award is made.

Sir C. H. Tupper, K.C., for appellant. *L. G. McPhillips*, K.C., for respondent.

Full Court.]

SCOTT v. MILNE.

[April 7.]

Agreement for sale of land—Time of the essence—Rescission—Laches.

In an agreement for the purchase of land with possession; purchaser covenanted, *inter alia*, giving vendor power to enter and determine tenancy on default, and that notice of default, addressed to purchaser at Vancouver, B.C., should be sufficient. Purchaser having become in default, and his address changeable, vendor wrote to a firm of brokers who were in communication with him, after two demands for payment of the moneys in arrear, desiring them to instruct purchaser of the cancellation of the agreement.

Held, on appeal (affirming the judgment of CLEMENT, J.) that the time allowed purchaser was not a waiver of the right of rescission under the agreement.

L. G. McPhillips, K.C., for appellant (plaintiff). *Bird*, for respondent (defendant).

SUPREME COURT.

Clement, J.]

REX v. GARVIN.

[March 28.]

Constitutional law—B. N. A. Act, s. 91—Adulteration Act—Provincial Health Regulations—Ultra vires.

On a motion to quash conviction by the acting police magistrate of Vancouver who fined defendant for having in his possession milk intended for sale which did not have the minimum

composition required by s. 20 of the Regulations authorized by the Lieutenant-Governor in Council under the Provincial Health Act, R.S.B.C. 1897, c. 91.

Held, that s. 20 of the Provincial Government Regulations governing the sale of milk and the management of dairies, cow-sheds and milk shops is ultra vires.

Craig, for the motion. *J. K. Kennedy*, contra.

Hunter, C.J.]

LEVI v. GLEASON.

[April 10.]

Municipal law—Alderman—Property qualification.

A candidate for alderman for the City of Victoria had, prior to his nomination conveyed away the lands on the alleged ownership of which he claimed qualification under s. 13, sub-s. (b) of the Municipal Clauses Act, but the conveyance remained unregistered. In an action to establish disqualification, and for penalties under s. 20,

Held, that the effect of s. 74 of the Land Registry Act, c. 23, 1906, is to make registration of conveyances taking effect after June 30, 1905, a sine qua non of the vesting of any interest, legal or equitable, in the grantee. *Falconer v. Langley* (1899) 6 B.C. 444 considered.

Belyea, K.C., for plaintiff. *Elliott*, K.C., for defendant.

COUNTY COURT.

Howay, Co.J.]

MULLER v. SHIBLY.

[March 28.]

County Court—Statute construction—Woodman's Lien for Wages Act, R.S.B.C. 1897, c. 194, s. 3—"Woodman" defined—Contractor and labourer, distinction between,

Defendant hired a team of horses from plaintiff for certain logging operations, and on default of payment for the use of the horses, which were not driven or controlled by plaintiff, the latter filed a lien against the logs, for the amount due. On an application to set aside the lien,

Held, that plaintiff was not a woodman within the meaning of the statute, but was a contractor.

Ladner, for the application. *McQuarrie*, contra.

Grant, Co.J.] IN RE THE NATURALIZATION ACT. [March 25.

Application by Japanese—Jurisdiction—Cross-examination.

In accordance with s. 17 of the Dominion Naturalization Act certain Japanese filed notices of intention to apply for naturalization. Objections to their naturalization were filed: (1) That the applicants were subjects of the Emperor of Japan and not free to change their allegiance; (2) That they did not intend to reside permanently in Canada; (3) That they did not understand the oaths taken by them and were not bound by them; (4) They did not intend to become bona fide British subjects.

Counsel for applicants contended that objections were improper and not within the Act, and cited *In re C. C. Webster*, 7 C.L.J. 39, as an authority that the court could not go behind the certificate of justice or notary and inquire whether the evidence on which it was granted was sufficient.

Held, that by the amendments of 1903 to the Naturalization Act, the scope of the judge's duty, as circumscribed in the decision *In re C. C. Webster*, is changed and that the judge has power to take any necessary measures to satisfy himself as to the truth of the facts stated and of the fitness of the applicant for British citizenship. Cross-examination of applicants ordered.

Haney and *Schultz*, for applicants. *Lucas*, contra.

Book Reviews.

A Concise Treatise on the Law of Wills. By H. S. THEOBALD, K.C. Seventh edition. With notes of Canadian statutes and cases by E. D. ARMOUR, K.C., of Osgoode Hall, Barrister-at-law. London: Stevens & Sons, Ltd., Chancery Lane. Toronto: Canada Law Book Company, Ltd. 1908.

We have referred to this valuable work in our editorial columns.

Stone's Justices' Manual for 1908. Fortieth edition. Edited by J. R. ROBERTS, Esq. London: Butterworth & Co., Bell Yard.

This edition gives, in an appendix, the Act passed last August to establish a Court of Criminal Appeal in England, introducing a new principle in the administration of criminal law in the mother country. The Act came into force on the 18th ult. and its practical working will be watched with interest.

A Treatise on the Law Relating to Devolution of Real Estate on Death, and the Administration of Assets. By ROBBINS & MAW. Fourth edition. London: Butterworth & Co., Bell Yard. 1908.

The general arrangement adopted in previous editions remains unchanged, but considerable alterations in and additions to some of the chapters have been made which will be found helpful.

We have works of our own on the Devolution of Estates Act of Ontario and other provinces, but our practitioners cannot afford to be without the light thrown on this difficult subject by such books as the above. It is now seven years since the previous edition.

Dowell's Income Tax. Sixth edition. By J. E. PIPER, LL.B. London: Butterworth & Co., Bell Yard.

Interesting reading, doubtless, to a large class in England, but not of much interest here, except to complete some public Law Library.

United States Decisions.

CARRIERS.—A motorman in charge of a street car is held, in *Strong v. Burlington Traction Co.* (Vt.) 12 L.R.A. (N.S.) 197, not to be negligent toward a passenger, as matter of law, merely because he fails to sound his gong to warn of the approach of the car one driving on the highway, who turns his horse across the path of the car, causing a collision and the injury of the passenger.

A passenger negligently expelled, because of failure to produce his ticket, from a train at a flag station where there is no

shelter and with the surroundings of which he is not familiar, after dark on a cold and stormy night, is held, in *Tilbury v. Northern C. R. Co.* (Pa.) 12 L.R.A. (N.S.) 359, not to be per se negligent in attempting to reach shelter at a station recently passed, by walking along the railroad track, rather than by seeking a highway.

The right of a consignee to refuse to receive a shipment, and to throw it upon the hands of the carrier, merely because of the latter's unreasonable delay in transportation, is denied in *Chesapeake & O. R. Co. v. Saulsberry* (Ky.) 12 L.R.A. (N.S.) 431.

DAMAGES.—A telegraph company which fails to deliver a telegram directing preparation for a funeral is held, in *Lyles v. Western U. Teleg. Co.* (S.C.) 12 L.R.A. (N.S.) 534, to be liable for mental suffering caused by the exposure of the corpse for several hours to the rays of the sun, and the delay of the burial to a very late hour of the night.

The measure of damages for destruction of a growing crop is held, in *Teller v. Bay & River Dredging Co.* (Cal.) 12 L.R.A. (N.S.) 267, to be its value as it stood on the ground at the time of destruction, to be arrived at, not by ascertaining what it had cost at that time, but from evidence of the probable yield of the land, multiplied by the market value of the crop, less cost of producing and marketing.

PROXIMATE CAUSE.—The fright of a traveller at a highway crossing to such an extent as to produce unconsciousness, because of the sudden approach of a train at an unlawful speed without signals, at a place where, because of the obstructed view, the traveller has reached a point of danger, is held, in *Morey v. Lake Superior Terminal & T. R. Co.* (Wis.) 12 L.R.A. (N.S.) 221, not to be such an extraordinary and unusual result that the negligence cannot be held to be the proximate cause of the resulting injury to the traveller while unconscious.

Negligence on the part of a railroad company in permitting shippers to accumulate large quantities of lumber on and adjacent to its right of way for shipment is held, in *Bowers v. East Tennessee & W. N. C. R. Co.* (N.C.) 12 L.R.A. (N.S.) 446, not to be the proximate cause of the destruction of a building by fire which spreads through such lumber to the building from that of a stranger some distance away, which ignited without fault of the railroad company.

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HON. MR. JUSTICE LATCHFORD.

Hon. Francis Robert Latchford, of the Ottawa Bar, takes the seat in the Chancery Division of the High Court of Justice for Ontario vacated by Mr. Justice Mabee, now Chief Commissioner of the Board of Railway Commissioners for Canada. Mr. Latchford held the position of Commissioner of Public Works and subsequently that of Attorney-General in the Ross Government in the Province of Ontario, so that much of his time has of late years been devoted to the field of politics, which is not in all respects desirable as a training ground for a member of the Bench, though it has some advantages even in that regard. It is therefore difficult to form an estimate of what Mr. Latchford's judicial future is likely to be. We congratulate him, however, upon his appointment, and wish him all success in his new and responsible position.

WORKMEN'S LIEN—DEFECTIVE DRAFTING OF STATUTE.

Another noteworthy illustration of the mischievous results which are constantly being produced by the imperfections of the present arrangements for drafting statutes has been furnished by a recent decision of the Manitoba Court of Appeal (a).

The point involved was, whether certain workmen, hired at the rate of so much an hour, were entitled under ss. 3 and 4 of the Builders' and Workmen's Act (Rev. Stat. Man. (1902) c. 14), to a lien on a building which their employer, an independent contractor, was erecting for the owner. It was held that the claimants were not within the purview of that statute, as it was applicable by its express terms only to

(a) *Dunn v. Sedziak* (1908), 7 West. Rep. 563.

workmen employed "by the day or the piece." The brief judgment in which this conclusion was announced does not afford any definite information regarding the grounds upon which it was based. Presumably the theory adopted was that a contract by which a person is engaged at so much an hour imported an engagement by the hour, and that the words of the statute in question could not, even by the most liberal construction, be made to cover an employment on this footing. Neither of these principles, it is manifest, is open to exception. Abstracted from any direct evidence with respect to the duration of a contract of hiring, the circumstance that the amount of the remuneration was defined by a stipulation to the effect that he was to receive a certain sum for each period of a specified length during which he should continue to work, undoubtedly requires the inference that the parties intended to contract for that period and no more (b). Nor can any objection reasonably be made to the second of the grounds upon which we assume the court to have founded its decision. Both in legal parlance and every day speech, the phrase, "employed by the day," bears a well-understood meaning, and to have treated it as covering an employment by the hour would manifestly have been wholly unwarrantable.

But while the decision itself is not obnoxious to adverse criticism, the same cannot be said of the enactment under construction. Considering the objects of that enactment, it is quite impossible to suppose that the legislature really intended to restrict its benefits, so far as servants engaged upon a time basis are concerned, to workmen employed "by the day." No one would seriously contend that the protection afforded by statutes of the kind under review is needed by workmen of this description in any such special degree as would justify granting them privileges denied to workmen performing similar services under

(b) In support of this well-established doctrine it will be sufficient to refer to the explicit statement of Buller, J., in *R. v. Newton Toney* (1788) 2 T.R. 453, that "if the payment of weekly wages be the only circumstance from which the duration of the contract is to be collected, it must be taken to be a weekly hiring."

contracts of a duration longer or shorter than a day. The only reasonable hypothesis applicable to the circumstances would seem to be, that it was the purpose of the legislature to create a lien in favour of workmen hired either *by time* or by the piece, and that, owing to the inadvertence or ignorance of the draftsman and other persons concerned in the framing of the statute, the more restricted phrase, "by the day," was inserted.

If the form in which this provision of the Act was passed is to be explained in this manner,—and the explanation is apparently the only one which is available to preserve the Manitoba House of Assembly from the imputation of having deliberately made an arbitrary, not to say absurd, distinction between one particular class of workmen and others equally deserving of protection,—the perpetration of an error so easily avoidable, and productive of so much disappointment to those whom it has prejudiced, affords a very striking proof of the urgent need for improving the system of Parliamentary drafting in this country.

The existing arrangements in some of the provinces are far from being satisfactory. Mistakes of the kind here adverted to would seldom occur, if adequate skill and care were expended in the selection of the phraseology to be used in enactments which alter the existing law. The exercise of such skill and care can be secured only in one way, that is to say, by utilizing expert knowledge to a much greater extent than at present. No statute should be framed without the assistance of a specialist who is qualified not merely to supply the language which will render it a clear and complete expression of the will of the legislature, but also of appreciating thoroughly the operation of each of its provisions with reference both to other enactments and to the departments of case-law which it affects. It is also desirable that a specialist should keep a close watch upon each measure during its progress through the legislature, so that the persons who have it in charge may be kept fully informed as to the consequences of any amendments that may be admitted in the course of the debates. Under the improved system to which these

observations point, it would be an extremely important part of the duties of a draftsman to call the attention of the legislature to any alterations which in his opinion would be productive of obscurity or inconsistency.

Specialists capable of performing the responsible and difficult work which has been outlined above can be secured only by the offer of a liberal remuneration. But salaries sufficiently large to attract barristers even of the highest standing would not be an excessive price to pay for services which would certainly obviate the necessity for a very considerable portion of the expensive litigation which is traceable under existing conditions to the defective drafting of statutes.

C. B. LABATT.

THE DEVOLUTION OF ESTATES ACT.

The very grave and serious questions which Mr. Betts raised in his paper published in this journal on December 1st last, seem to call for the serious attention of the legislature.

We may remind our readers that nearly all the difficulties he points out have been caused by the fatal departure from the fundamental principle of the Act as originally passed.

The plan of shifting and re-shifting the title to realty by omitting to register or by registering cautions was no part of the Act as originally passed. That is the result of tinkering.

It has been pointed out in this journal more than once that the original Act contemplated that in every case the title should be traced through the personal representative. The Act was beginning to work satisfactorily when at the instance of a country solicitor who happened to be a member of the legislature, it was fatally marred by grafting on it the old principle of a direct devolution of the estate from the testator or intestate to the beneficiaries.

The incorporation of this principle creates all the difficulties to which Mr. Betts refers. Is not the obvious course to retrace

our steps and revert to the scheme of the Act as originally passed?

One defect certainly did exist in the original Act and that was the omission to provide for the vesting of the estate during any interval which may elapse between the death of an owner and the grant of probate or letters of administration.

In every case there must be a hiatus between the death and the grant of probate or administration. Where is the estate in the meantime? We do not mean the land, but the legal title?

In some of the Australian colonies they have provided for this by the appointment of a public functionary in whom the title to all estates vests subject to be divested on the grant of probate or administration. Is not that our proper remedy?

The sole reason of the recent amendment to the Act was to save the expense of conveyances from the personal representative to the beneficiaries. This might easily have been got over by some simple method which would not have invaded the fundamental principle of the Act.

One method which might be suggested would be a general vesting order vesting land in the beneficiaries according to their respective interests grantable at small expense by a County Court judge with the consent of the personal representative whenever the estate was below a certain value and in other cases by a judge of the High Court.

This is another illustration of the evils resulting from want of a careful supervision of legislation as it passes through its various stages by some specialist appointed for the purpose; the need of which is enlarged upon in another place.

SUNDAY OBSERVANCE AND GOLF.

Whilst we trust that the glamour of golf has not swayed the judicial mind, we can scarcely concur in some of the utterances from the Bench in relation to this (shall we say) recreation, for we are told by some of these learned gentlemen that it is not "a game." It seems to be in their estimation a sort of

solemn function which is held to be outside existing provisions for the preservation of the sanctity of the Lord's day, at least so far as the law in the Province of Ontario and in Cape Colony is concerned.

As to the former, it was decided in *Reg. v. Carter*, 31 C.L.J. 664, that, though it is not lawful for any person on that day "to play at skittles, ball, foot-ball, racquets, or any other noisy game," there was no objection to playing golf, as the word "ball" (which the learned judge euphemistically described as a "sphere") does not include a ball used in golf, and also that golf is not a "noisy game."

This function has also come up for judicial discussion, with the solemnity appropriate to the occasion, in Cape Colony (*Rex v. Ochley*, 27 S.A.L.J. 117). Under the Sunday observance ordinance in force there since 1838 it is "lawful for any magistrate, police officer, etc., to disperse all persons gathering together on the Lord's Day in any public or open place for the purpose of gambling, fighting dogs, fighting cocks, or playing at any game, and all persons actually playing as aforesaid shall on conviction be sentenced," etc.

Under this enactment some golfers were convicted and fined. An appeal was allowed by the court on the ground that there was no "gathering together" to play a game, and moreover that in their opinion no "game" had been played at all. It appears that these crafty South African sports had carefully considered the situation and arranged that each golfer should proceed around the course alone, and so, not having "gathered together" as they claimed with any one else, it was held that they did not come within the ordinance. The reasoning was somewhat subtle not to say "shaky," as was also that of the judgment of the court as to there being no "game" involved, inasmuch as it was thought that that word means something in the nature of a "contest for supremacy, and was not to be taken in its widest meaning of pastime, or amusement;" otherwise every person who rides a bicycle or rows a boat on Sunday would contravene such an ordinance. They seemed to think that

golf was not so much a game as an exercise appropriate and helpful in the line of Sunday meditation, though it is said that explosions of a sulphurous character are not unknown during these exercises—not perhaps “noisy” but at least deep and expressive. We would suggest that it might more properly be described as a sedate and solemn procession composed of a ball, a biped and a “bogey.”

We are inclined to think that at least one of our judges in Ontario would if these cases were to come before him on appeal unmercifully “riddle” the reasoning and result arrived at therein.

We are glad to know that the state of affairs referred to in our issue of October 15th, 1907, is now about to be remedied by the Board of Railway Commissioners. In the article referred to we called attention to the want of uniformity existing in the forms of bills of lading used by the various railway companies, some of which were approved by the Board without sufficient examination or consideration, and others not examined at all, but yet, in effect, given statutory authority. A circular has now been issued by the Board pointing out that the views of those interested are so divergent as to create a complication objectionable and unnecessary, and suggesting a conference between representatives of the carriers and shippers. This was the course pursued when a similar matter was under consideration by the Inter-State Commerce Commission in the United States.

In a number of cases before the Board evidence had been taken before the late Chief Commissioner, Mr. Killam, but no adjudication had been made at the time of his death. A re-hearing would have caused great additional expense in time and money. We recently referred to some of these cases (see ante p. 172). In two cases at least we understand that a re-hearing will not be necessary, the parties having agreed that the evidence may be submitted to the present Chief Commissioner, and judgment given by him thereon.

In the State of Wisconsin—we know not whether there is a similar law in any other State—it has been enacted by the State legislature that, “whenever a person pays for the use of a double lower berth in a sleeping car, he shall have the right to direct whether the upper berth shall be open or closed, unless the upper berth is actually occupied by some other person, and the proprietor of the car and the person in charge of it shall comply with such direction.” A legal problem recently arose out of this in the case of *State v. Redmon*, 114 N.W. Rep. 137, where the court was charged with the duty of deciding as to the constitutionality of the above statute. The result was a learned judgment as to police powers in general and as to the limits of Federal and States jurisdiction, and a finding that the enactment was, under their law, unconstitutional. This, however, need not, at present, concern us. We only refer to the matter now to express the joy we feel that some glimmering of sense is beginning to penetrate into the dull brain of the travelling public, by the knowledge that such a law as that quoted above is in force anywhere, or, at least, that it would like to be in force if the judicial mind would so permit; and in the hope that an attempt may be made by some legislator who is not afraid of railway magnates to get rid of the present tyranny which compels obliging and susceptible porters in sleeping cars to put the regulation lid over the occupants of lower berths, without the slightest benefit even to the company, and very much to the detriment of the health and temper of a long-suffering travelling community. What member of Parliament will make his name famous and secure himself many votes by endeavouring to pass similar legislation in this country?

CUMULATIVE LEGACIES.

“Legacies of equal, less, or greater amount given by different instruments, as by will and codicil, to the same person, are *prima facie* cumulative.” No one will dispute that statement of the law as laid down by Mr. Theobald in the seventh edition of his

standard work on Wills (p. 158). Common sense tells us that a testator would not by codicil substitute a legacy of equal amount for that given by the will; it would be a waste of writing. The law has carried the presumption further, and presumes that any legacy by a second document is intended to be in addition to what has been given by the previous one.

The case of *Wilson v. O'Leary*, 26 L.T. Rep. 463, L. Rep. 7 Ch. 448, is a strong instance of the application of this rule. A testator had by his will bequeathed the residue of his property to J. and H. in equal shares. He afterwards executed two codicils which bore a considerable resemblance to each other. Of the legacies to the same persons, some were of different amounts and some of the same amount in the two codicils, while a legacy to a person in the first codicil was not repeated in the second, but one of equal amount was given to another person, and in the second there was the declaration that "these shall be free of legacy duty." It was sought to put in evidence a letter by the solicitor who had prepared the will and first codicil, advising the testator to copy the first codicil, as the signature was in an inconvenient place. The Court of Appeal decided that this was clearly inadmissible, as the question was merely one of construction of the documents.

In *Re Pinney* (1902) 46 Sol. Jo. 552, evidence was proffered to shew that the codicil disposed of all the testatrix's property except 2s. 5d.; but Mr. Justice Joyce refused to allow evidence on this head, and held that the legacies were cumulative. In refusing to admit such evidence he followed the decision of the House of Lords in *Higgins v. Dawson*, 85 L.T. Rep. 732, (1902) A.C. 1. Lord Justice James gave the leading judgment in *Wilson v. O'Leary*, and, in doing so, said that "where there is a positive rule of law of construction such as exists in these cases—that is to say, that gifts by two testamentary instruments to the same individual are to be construed cumulatively—the plain rule of law and construction is not to be frittered away by a mere balance of probabilities." His Lordship referred to two cases where the contrary had been held, but stated that he could

not help thinking that in both those cases the court of construction had acted upon a sort of feeling that, in truth, the one instrument was intended to be an entire substitution for the other.

The position of the court granting probate is very different in this matter to that of the court of construction. The Probate Division decides whether the two documents are to be admitted to probate or not, and in doing so, in cases of doubt, admits external evidence (see *In the Goods of Bryan*, 96 L.T. Rep. 584, (1907) P. 125), but the court of construction is bound to accept the finding of the Probate Division that there are two testamentary documents, and must construe them in accordance with that finding. An authority for this principle is to be found in the old case of *Foy v. Foy*, 1 Cox 163, where Sir Lloyd Kenyon said that although he should have had great doubt (in case it had been competent to him to have decided the question) whether the last paper, which was proved as a codicil, was not, in fact, a new will, and therefore revoked all the others; yet as the Ecclesiastical Court had granted probate of them all, he was bound to consider them all as subsisting in full force. The Probate Division is the successor of the Ecclesiastical Court.

This principle has to be particularly borne in mind where the second document describes itself as the last will. The mere fact that the second document is described as the last will will not ipso facto revoke an earlier will. Thus in *Simpson v. Foxon*, 96 L.T. Rep. 473, (1907) P. 54, the later instrument commenced, "This is the last and only will and testament of me," but the president held that it was not the testator's only will, and that "last and only" did not revoke his former testamentary dispositions.

The statement in Theobald on Wills (p. 159) that "If the instrument by which the second gift is made is not a codicil, but is described as a last will and testament, the presumption is strong that it was intended to be in substitution so far as it goes for the prior instrument" is too wide.

In all probability the second document will be described in the probate as a "codicil," and it would be more accurate to say that it will, so far as it goes, alter the earlier will.

All the cases referred to by Mr. Theobald to prove his point had other marks that the legacies were intended to be substitutional. In *Jackson v. Jackson*, 2 Cox 35, there was the gift of the same specific chattels in both; so there was in *Tuckey v. Henderson* 33 Beav. 174, and in the last-named case there was also a gift of the residue in each document. *Kill v. North*, 14 Sim. 463, 2 Ph. 91, resembled *Tuckey v. Henderson*, and there was also there a direction to pay debts in both instruments.

Now, it is obvious that specific chattels or the residue cannot be given twice over, while it is equally unlikely that a testator will wish his debts to be paid twice; so that there were in those cases other marks to shew that the scheme of distribution in the first document was so to be modified by the later one that the same legatees should not receive benefits under both. The other case referred to by the above-named learned author in *Re Bryan*, supra, but that was not the decision of a court of construction.

In the unreported case of *Re Trimmer* (1907) T. 2028 (Feb. 13, 1908), before Mr. Justice Eve, the second document, described in the probate as a codicil, commenced with the words, "This is the last will." There was, however, no specific gift or direction to pay debts in either instrument, while the gift of residue was in the former only. The learned judge held that in such a case the testator's description of the second document as his last will was not, in the absence of other marks of his intention, sufficient to rebut the rule that legacies by different instruments are cumulative, not substitutional.—*Law Times*.

RIGHTS OF MINORITY STOCKHOLDERS.

The doctrine frequently asserted, that equity protects the minority stockholder, may be stated to comprehend a right to an accounting or an injunction with respect to transactions ultra vires or amounting to a breach of trust. The plaintiff must be

a bona fide stockholder; *Robson v. Dobbs* (1869) L.R. 8 Eq. 301; *Belmont v. Erie Ry. Co.* (1869) 52 Barb. 637; he must generally shew special injury where the transaction is not ultra vires; *Hill v. Nisbet* (1884) 100 Ind. 341; *Hedges v. Paquett* (1869) 3 Ore. 77; and, the corporation being a trustee for the stockholders, in most cases he must allege and prove that the corporation is unwilling or unable to bring suit. *Hawes v. Oakland* (1881) 104 U. S. 450; *Greaves v. Gouge* (1877) 69 N.Y. 154; *Dumphy v. T. N. Assn.* (1888) 146 Mass. 495. But when the transaction is ultra vires, *Stebbins v. Perry County* (1897) 167 Ill. 567; *Botts v. Simpsonville, etc., Turnp. Co.* (1888) 88 Ky. 54, or the corporation is under the control of the guilty parties, *Brewer v. Boston Theatre* (1870) 104 Mass. 378; *Wickersham v. Crittenden* (1892) 93 Cal. 17; *Rogers v. Ry. Co.* (1898) 91 Fed. 299, such proof is unnecessary. Whether or not an allegation that the directors have been requested to sue and have refused is sufficient, seems to be unsettled, some courts holding that the plaintiff need not apply to a stockholders' meeting, *Gregory v. Patchett* (1864) 33 Beav. 595; Cook, Corp. sec. 720, and others, that this is necessary, *Foss v. Harbottle* (1843) 2 Hare. 461; *Bill v. Western Union T. Co.* (1883) 16 Fed. 14, except in the possible case of a fraud which could not be authorized by a majority of the stockholders. *Mason v. Harris* (1879) L.R. 11 Ch. Div. 97. Although there be such an authorization, the plaintiff's right is not impaired, for a majority of the stockholders sustain much the same relation towards the minority as the directors sustain towards all the stockholders. *Farmers', etc., Co. v. New York Ry. Co.* (1896) 150 N.Y. 410; *Erwin v. Oregon, etc., Co.* (1886) 27 Fed. 625. The right of action is not limited to cases of technical fraud, but attaches to every breach of trust, including, it has been held, gross negligence. *Ives v. Smith* (1888) 3 N.Y., Supp. 645.

Fraud exists where the interests of the corporation are deliberately neglected in favour of a personal or other interest. An oppressive scheme of management "so far opposed to the true interests of the corporation itself as to lead to the clear in-

ference that no one thus acting could have been influenced by any honest desire to secure such interests" may be enjoined; *Gamble v. Queens, etc., Co.* (1890) 123 N.Y. 91; see also *Hannerty v. Standard Theatre Co* (1891) 109 Mo. 297; but poor management alone, although resulting in loss to the corporation, furnishes no ground for the interference of equity. *McMullen v. Ritchie* (1894) 64 Fed. 253; *Ellerman v. Chicago, etc., Co.* (1891) 49 N.J. Eq. 217; *Leslie v. Lorillard* (1888) 110 N.Y. 519. The fraud being a deliberate service of an outside interest, the proof must shew a distinct favouring of that interest. Primarily the question of the adequacy of the consideration is examined, and where it appears that an undue advantage has been taken by the corporate managers, the contracts are avoided or the performance enjoined, *Woodroof v. Howes* (1891) 88 Cal. 184; *Sage v. Culver* (1895) 147 N.Y. 241, but a substantial discrepancy between the consideration and the market value of the res is not conclusive. *Gamble v. Queens, etc., Co.*, supra. Material evidence may be gleaned from a conflict or intermingling of the interests involved in the transaction: as in cases of contracts between the directors, officers, or majority stockholders and the corporation, *Rogers v. Lafayette, etc., Works* (1875) 52 Ind. 296; *Munson v. Syracuse, etc., Ry. Co.* (1886) 103 N.Y. 58, or between two or more corporations having common directors or officers, *Ryan v. Leavenworth, etc., Ry. Co.* (1879) 21 Kan. 365; *Fitzgerald v. Fitzgerald, etc., Co.* (1895) 44 Neb. 463; *Pearson v. Concord Ry. Corp.* (1883) 62 N.H. 537, or common majority stockholders. *Meeker v. Winthrop Iron Co.* (1883) 17 Fed. 48; *Peabody v. Flint* (Mass. 1863) 6 Allen. 52; *Farmers', etc., Co. v. New York, etc., Ry. Co.*, supra; *Goodin v. C. & W. Canal Co.* (1868) 18 Oh. St. 169. Lord Hardwicke said in *Whelpdale v. Cookson* (1747) 1 Ves., Sr. 9, "It is not enough for the trustee to say 'You cannot prove any fraud' as it is in his power to conceal it," and upon analogy to cases of strict trust to which this reasoning is applicable and in which the transac-

tion is effected by a single and the only trustee, many decisions have declared these contracts void without proof of fraud in fact, citing almost invariably cases involving the interest of the technical trustee rather than that of the corporate director, *Pearson v. Concord Ry. Corp.*, supra; *Munson v. Syracuse, etc., Ry. Co.*, supra; *Wardell v. R. R. Co.* (1880) 103 U. S. 651, and others have held likewise, provided the officer interested was needed to make a quorum in the board, *Butts v. Wood* (1867) 37 N.Y. 317, or his vote was necessary to a majority. *Bennett v. St. Louis & etc., Co.* (1895) 19 Mo. App. 349. These decisions, however, are overborne by the weight of authority, requiring proof of actual fraud. *Burden v. Burden* (1899) 159 N.Y. 287; *Shaw v. Davis* (1894) 78 Md. 308; *Leavenworth County Com'r's. v. Chicago, etc., Ry. Co.* (1885) 25 Fed. 219; Aff'd. 134 U.S. 688. The nature of the question is such that each case must be decided very largely upon its facts, and the tendency seems to be to resolve the whole problem into the plain question of "fairness" to the plaintiff. *Continental Ins. Co. v. New York, etc., Ry. Co.* (1907) 187 N.Y. 225; *Colgate v. U. S. Leather Co.* (N.J. 1907) 67 Atl. 657.

Thus in a recent case in which a minority stockholder sued to enjoin a merger of two trust companies, it appeared that the companies had directors and officers in common and that forty-nine per cent. of the stock of the plaintiff's company was owned by a majority stockholder of the other company. The merger agreement seemed on its face grossly unfair to the plaintiff; but there was no proof of actual fraud and the court balanced the apparent inequality by taking into consideration the greater earning capacity, present and prospective, of the other company. *Colby v. Equitable Trust Co.* (1908) 38 N. Y. Law Jour. No. 119. The intermingling of the corporate interests being insufficient without other evidence of fraud, the decision turned upon the question of consideration; and this the court found to be adequate.—*Columbia Law Review*.

*RECOVERY FOR DAMAGES FOR MENTAL SUFFERING
IN TORT AND IN CONTRACT.*

The right to recover for damages for mental suffering, in actions arising *ex delicto* and *ex contractu*, is a question in the law concerning which there is a diversity of judicial opinion. There is an apparent reluctance to grant recovery in such cases, due chiefly, perhaps, to the difficulty of definitely ascertaining the true measure of damage from a pecuniary point of view.

In actions arising *ex delicto* the weight of authority is in favour of a recovery for anguish of mind, but the right is limited to three well-defined classes of cases, viz., first, where some physical injury has been inflicted; second, where the plaintiff has been subjected to personal indignity, as in defamation, malicious prosecution, or seduction; and third, where a clear legal right of the plaintiff has been invaded in such a wilful or malicious manner as would naturally cause mental distress, regardless of the preceding elements of physical injury or personal indignity. It does not follow, however, that this is a proper element of damage in all tort actions, and it has been held that there could be no recovery for mental suffering which resulted to a mother from the death of a child by a wrongful act; nor for libeling the dead; nor for mere fright resulting in a nervous disorder; nor for anxiety for safety of one's self or family during a blasting operation; nor from threats or duress by means of which property was unlawfully procured. The better rule would seem to be that recovery for mental pain in this class of cases is restricted to those in which there is an accompanying invasion of a legal right, physical bodily injury, malice, insult or inhumanity.

As a general rule, pain of mind is not a subject of damages in actions arising *ex contractu*, except where the breach of a contract amounts in substance to an independent, wilful tort. Exceptions to the general rule are actions for breach of promise to marry, and actions against carriers for wilful or malicious injuries to passengers, in violation of their contract to carry safely. The great weight of authority is against a recovery

for mental suffering through failure to deliver telegrams. Some Courts, however, hold contra, in accordance with the so-called "Texas doctrine." Where this doctrine has been followed it has been adhered to consistently, and an extreme case is found in North Carolina, where recovery was allowed for fright and worry incident to a father's failure to meet his young daughter at a railroad station, because of the non-delivery of a telegram advising him of her arrival there at a scheduled hour, and the terror which ensued during a lonely ride at midnight to her home.

Recovery has also been allowed for mental pain resulting from the mutilation of a dead body; from the breach of contract to carry a dead body safely, where such breach constituted a wilful tort; and from the breach of contract of an undertaker to keep safely the body of a dead child. The Supreme Court of Minnesota, however, has recently refused a recovery for mental distress where a railroad company negligently failed to carry a dead body to its destination according to the usual train schedule, the delay interfering with the funeral plans and causing anxiety, humiliation and other anguish of mind. The case holds that the facts establish a breach of contract only, and in the absence of a wilful tort incident to such breach, mental suffering is not an element of damage. It would seem to be in exact accord with the general rule, and commends itself to the legal mind as a sound view of the question involved. The subject is thoroughly reviewed, and the authorities fully stated, in the opinion of the court.—*University of Philadelphia Law Review*.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

LANDLORD AND TENANT—LEASE—COVENANT NOT TO ASSIGN WITHOUT CONSENT—PAYMENT FOR LEAVE TO ASSIGN—FINE OR SUM OF MONEY IN NATURE OF A FINE—CONVEYANCING ACT, 1892 (55-56 VICT. C. 13) S. 3—WAIVING BENEFIT OF STATUTE.

Andrew v. Bridgman (1908) 1 K.B. 596. In this case the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.), have affirmed the judgment of Channell, J. (1907) 2 K.B. 494 (noted ante, vol. 43, p. 731). By the Conveyancing Act, 1892, it is provided that a covenant in a lease not to assign without consent of the lessor shall, unless the contrary be expressed, be deemed subject to a proviso that no fine or sum of money in the nature of a fine shall be payable for giving such consent. The covenant in question in this case contained no provision to the contrary, but the lessor on being applied to for his consent, refused to give it except on the terms of being paid £45. This the lessee paid under protest, and the present action was brought to recover it; but the action failed, because the court held, that the lessee was under no obligation to have paid it, but on the consent being improperly refused, he might, under the statute, have made the assignment without leave; but there was nothing in the statute to prevent his making a bargain with the lessor, and, in fact, waive the benefit of the statute, as he had done.

INSURANCE—WARRANTY OF FREEDOM FROM CAPTURE—CAPTURE OF SHIP—SUBSEQUENT WRECK—CONDEMNATION—TITLE OF CAPTORS.

In *Andersen v. Martin* (1908) 1 K.B. 601 the judgment of Channell, J. (1907) 2 K.B. 248 (noted ante, vol. 43, p. 620), has been affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.). The action was brought on a policy of marine insurance which contained inter alia a warranty against capture. The vessel had been captured by a belligerent, but before condemnation by a Prize Court, she became a total wreck. Channell, J., had held that though the capture of the vessel did not, until condemnation by a Prize Court, divest the owner's property, yet, when condemnation did take place, the title of the captors related back to the time of the capture,

and, therefore, the plaintiff could not succeed. The Court of Appeal, however, was of the opinion that, as between the owner and insurer, the question of relation back was really immaterial; the true view being, that the owner had lost his vessel by capture, and the captors had lost their prize by shipwreck, and as the policy excepted loss by capture, the plaintiff could not recover.

PUBLIC BODY—EXPROPRIATION OF LAND—STATUTORY POWER OF EXPROPRIATION—NOTICE TO TREAT—CREATION OF NEW INTEREST AFTER NOTICE TO TREAT—COMPENSATION.

Zick v. London United Tramways (1908) 1 K.B. 611. The defendants in this action were empowered for the purpose of their undertaking to expropriate lands, and in pursuance of their statutory powers they gave the landlord of the lands in question in the action notice to treat. At the time the notice to treat was served the land was in the occupation of a tenant under an argeement in writing for the term of three years from March 14, 1905, subsequently by arrangement with the landlord and this tenant the plaintiff became lessee of the premises for a term of three years from 14 February, 1906, on similar terms in other respects to those under which the previous tenant held. Without notice to the plaintiff the defendants had entered and taken possession of the lands without making any compensation to the plaintiff, and the present action was for trespass in so doing. Jelf, J., who tried the action, held that notwithstanding the operation by surrender by operation of law of the former tenancy and the creation by the landlord, after notice to treat, of a new interest in favour of the plaintiff, the plaintiff was, nevertheless, entitled to compensation in respect of that interest so far as it did not exceed that existing at the time of the notice to treat and, therefore, during the period ending March 14, 1908, inasmuch as the creation of the new tenancy during that period did not impose any additional burden on the defendants. He therefore gave judgment for the plaintiff for 40s. damages and costs on the High Court scale, accompanied by the declaration that he was entitled to compensation.

CRIMINAL LAW — LARCENY — PLEADING—INDICTMENT—SUFFICIENCY OF AVERMENT AS TO PROPERTY IN GOODS.

In *The King v. Stride* (1908) 1 K.B. 617 the defendants were indicted for stealing 1,000 pheasant's eggs, "of the goods and chattels of and belonging to one Walter Gilbey." It was con-

tended on the part of the defendant that pheasants being *feræ naturæ* this averment of property was insufficient, inasmuch as it did not sufficiently appear that the eggs in question had been reduced into the possession of Gilbey. But the Court for Crown Cases Reserved (Lord Alverstone, C.J., and Lawrance, Ridley, Darling and Channell, JJ.) held that it was sufficient.

NEGLIGENCE—INFRINGEMENT OF PUBLIC RIGHT—SPECIAL AND PARTICULAR DAMAGE—NEGLIGENT NAVIGATION—DAMAGE TO DOCK—SPECIAL DAMAGE BY BEING DEPRIVED OF USE OF DOCK.

In *Anglo-Algerian SS. Co. v. Houlder Line* (1908) 1 K.B. 659 the plaintiffs sued the defendants for damages by reason of the defendants having through unskilful navigation injured a public dock necessitating its being closed for repairs, whereby the plaintiffs were prevented from having access to the dock. The plaintiffs' ship arrived at the dock in order to take a cargo which was ready in the dock to be shipped, but owing to the dock having been injured by the defendants through unskilful navigation, it was closed for repairs, and plaintiffs' vessel could not enter, and delay and loss was thereby occasioned to the plaintiffs; but Walton, J., (the trial judge) held that the defendants' negligent act was too indirectly connected with the plaintiffs' loss to give them any cause of action against the defendants. The action, therefore, failed.

DISTRESS—EXCESSIVE CHARGES BY BAILIFF—PENALTY FOR EXTORTION BY BAILIFF—DISTRESS (COSTS) ACT, 1817 (57 GEO. III. c. 93)—(R.S.O. c. 75, s. 6).

Robson v. Biggar (1908) 1 K.B. 672. It was held by the Court of appeal (Williams, L.J., and Barnes, P.P.D., and Biggam, J.), that a proceeding before justices to recover a penalty against a bailiff for extortion under the Distress Act, 57 Geo. III. c. 92 (see R.S.O. c. 75, s. 6), is a "criminal cause or matter," and, therefore, under the Judicature Act no appeal lay to the Court of Appeal from a decision of a Divisional Court on a case stated.

BANKRUPTCY—FOREIGN AND DOMESTIC ASSETS—POOLING OF ASSETS—CREDITORS.

In *re MacFadyen* (1908) 1 K.B. 675. Bigham, J., here authorized an English trustee in bankruptcy of an insolvent com-

pany which had assets in a foreign country in the hands of an official assignee to enter into an agreement with such official assignee for the pooling of all the assets and distributing them ratably among the English and foreign creditors, although there is no express provision in the English Bankruptcy Act authorizing such an arrangement.

**BREACH OF PROMISE OF MARRIAGE—PROMISE BY MARRIED PERSON
TO MARRY ANOTHER—PUBLIC POLICY—INABILITY TO CONTRACT.**

Spiers v. Hunt (1908) 1 K.B. 720 was an action for breach of promise of marriage; the promise was given by the defendant to marry the plaintiff on the death of the defendant's wife. Phillimore, J., held that such a promise is contrary to public policy and null and void.

Wilson v. Carnley (1908) 1 K.B. 729 is another case of the same kind, the promise being given when, to the knowledge of the plaintiff, the defendant was a married man, and in this case the Court of Appeal (Williams, Farwell and Kennedy, L.JJ.) came to the like conclusion.

**PRACTICE—ACTION TO RECOVER GAMBLING DEBT—FRIVOLOUS AND
VEXATIOUS ACTION—CAUSE OF ACTION—NEW CONSIDERATION—
FORBEARANCE TO SUE.**

In *Goodson v. Grierson* (1908) 1 K.B. 761, the defendant applied to dismiss the action as being frivolous and vexatious, on the ground that the plaintiff had admitted on his examination that the debt sought to be recovered was a gambling debt. But the plaintiff by his answer set up as the consideration for the defendant's indebtedness, his forbearance to sue and giving time to the defendant at the latter's request. The Master dismissed the action and Jelf, J., affirmed his order, but the Court of Appeal (Moulton and Buckley, L.JJ.) reversed the order, holding that the giving of time at the defendant's request might possibly constitute a good consideration for the debt claimed, and that at all events the action ought to proceed to trial in order that all the facts might be laid before the Court. "In order to support an application of this kind the defendant has to shew that under no possibility could here be a good cause of action consistently with the pleadings and the facts in the case," per Moulton, L.J.

SHIP—BILL OF LADING—CONDITION LIMITING LIABILITY—LOSS DUE TO NEGLIGENCE.

Baxter's Leather Co. v. Royal Mail SS. Co. (1908) 1 K.B. 796 was an action to recover damages against a shipowner for loss of the plaintiffs' goods by reason of the defendants' negligence. The bill of lading expressly stipulated that the ship-owners should "under no circumstances" be liable for any goods of whatever description "beyond the amount of £2 per cubic foot for any one package." The defendants contended that this was the limit of their liability for the goods in question, notwithstanding that they had been lost through negligence on their part, and Bigham, J., held that they were right.

PRACTICE—STAYING OF ACTION—ABUSE OF PROCESS—CAUSE OF ACTION ARISING OUT OF JURISDICTION—SUBJECT MATTER OF ACTION OUT OF JURISDICTION—DEFENDANTS ORDINARILY RESIDENT OUT OF JURISDICTION—SERVING DEFENDANT OUT OF JURISDICTION AS BEING NECESSARY PARTY.

In re Norton, Norton v. Norton (1908) 1 Ch. 471 was an action for an account against the trustees of a marriage settlement for an account. The settlement was made in India, and the property of the trust was situate there and all the defendants though having an English domicile were ordinarily resident in India. The plaintiff had been separated from her husband (one of the trustees) and had since 1902 been living in France. Two of the defendants came on a visit to England, and while there the plaintiff came over from France and commenced the action against them; and she then applied for an order for leave to serve Brodie, the third trustee in Calcutta, on the ground that he was a necessary party to the action against the other defendants. The husband applied to stay all proceedings on the ground that they were vexatious and oppressive, which Eady, J., refused. Eady, J., however, refused to allow service on the trustee in India, on the ground that the claim was for an account only, and it was admitted by plaintiff's counsel that the trustee sought to be served had not received any property as trustee of the settlement. The orders were appealed from. The Court of Appeal (Williams, Farwell and Kennedy, L.JJ.) held that the property of the trust being in India, and the defendants being ordinarily resident there, it was oppressive and vexatious to bring the action in England, and it was accordingly stayed, and the order refusing leave to serve the defendant in India was, of course, affirmed.

CHARITY—"CHARITABLE OR IMMIGRATION USES"—UNCERTAINTY.

In re Sidney, Hingeston v. Sidney (1908) 1 Ch. 488 the decision of Eady, J. (1908) 1 Ch. 126 (see ante, p. 148), to the effect that a gift by will of personal estate "for charitable uses or for such immigration uses, or partly for such charitable and partly for such immigration uses" as the trustees in their discretion might think fit is void for uncertainty, immigration uses, unless expressly for the benefit of poor persons, not coming within the term "charity," was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.).

TRUST FUND—UNAUTHORIZED INVESTMENT—RESTORATION OF CAPITAL WITH INTEREST AT 5 PER CENT.—CAPITAL AND INCOME—INCREASED INTEREST OBTAINED BY UNAUTHORIZED INVESTMENT.

In Slade v. Chaine (1908) 1 Ch. 522 a summary application was made to Kekewich, J., to determine the rights of tenant for life and remainderman in a trust fund which had been misappropriated by the trustee and subsequently restored with interest at 5 per cent. The misappropriation consisted in the trustee applying the money in paying his private debt. The tenant for life was his wife, who made no claim. On behalf of the remainderman it was contended that the extra interest which she had received, or should be taken to have received, over and above what would have been realized by an authorized investment of the fund, ought to be treated as an accretion to the capital, but Kekewich, J., refused to give effect to that claim, and the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) held that he was right.

MASTER AND SERVANT—CONTRACT OF SERVICE—REPUDIATION—WRONGFUL DISMISSAL—UNDERTAKING NOT TO TRADE WITHIN CERTAIN LIMITS.

General Billposting Co. v. Atkinson (1908) 1 Ch. 537 was an action to restrain the defendant, who had formerly been a servant of the plaintiffs, from committing a breach of an undertaking not to trade, on quitting plaintiffs' employment, within certain limits. The defendant set up and established that the plaintiffs had wrongfully dismissed him from his employment, and that had the effect of a repudiation of the contract on their part, and a consequent release of the defendant from the undertaking restricting his right to trade on the termination of his en-

gagement. Neville, J., thought that, notwithstanding the wrongful dismissal, the plaintiffs were entitled to enforce the undertaking, but the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) were of a different opinion and reversed his decision and dismissed the action.

RECEIVER—PARTITION ACTION—SALE BY MORTGAGEE—PURCHASE BY RECEIVER WITHOUT LEAVE OF COURT.

In *Nugent v. Nugent* (1908) 1 Ch. 546 the sole point in question was whether a receiver could, without the leave of the court, purchase for his own benefit property of which he was appointed receiver at a sale thereof by a mortgagee under a power of sale. Eady, J., held that he could not (1907) 2 Ch. 292 (noted ante, vol. 43, p. 724), and the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) have now affirmed his decision.

WILL—CONSTRUCTION—NO NEXT OF KIN—UNDISPOSED OF RESIDUE—EXECUTORS BENEFICIALLY ENTITLED—EQUAL PECUNIARY LEGACIES TO EXECUTORS—UNEQUAL SPECIFIC LEGACIES TO EXECUTORS—PRESUMPTION OF INTENTION.

In *re Glukman, Attorney-General v. Jefferys* (1908) 1 Ch. 552. This was an appeal from the decision of Eady, J. (1907) 1 Ch. 171 (noted ante, vol. 43, p. 354). That learned judge held that where a pecuniary legacy of any kind is left to executors, that raises a presumption that the testator did not intend that they should take beneficially the undisposed of residue of the personalty in the event of there being no next of kin, even though such legacies were unequal; but the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) have come to the conclusion that the presumption of an intention that executors should not take beneficially undisposed of residue, where there are no next of kin, only arises from the fact of gifts being made to the executors by the testator, where such gifts are equal, and if there is any inequality in such gifts the presumption does not arise. In the present case the testator had given each of his executors £1,000, but to two of them he had also given other specific gifts. This inequality was held to prevent any presumption of an intention that they should not take beneficially the undisposed of residue.

APPOINTMENT—POWER TO APPOINT BY WILL—SPECIAL FORMALITIES—NON-COMPLIANCE WITH SPECIAL FORMALITIES IN EXECUTION OF POWER—WILL VALID IN PLACE OF DOMICIL—PROBATE IN ENGLAND.

In re Walker, MacColl v. Bruce (1908) 1 Ch. 560, a domiciled Scotswoman had a power of appointment over a trust fund exercisable by "her last will and testament in writing or any codicil or codicils thereto to be signed in the presence of and attested by two or more witnesses." She executed a will with the necessary formalities exercising the power and appointing the whole fund to her three daughters. Subsequently by holographic dispositions written from time to time and under the last of which her unattested signature appeared, she referred to the fund and gave thereout £500 to each of her sons therein named. One son afterwards died, and by a later writing she cancelled the gift to him and gave it to her three daughters. The holograph writings were effective testamentary papers according to Scots law and were with the will admitted to confirmation in Scotland, and were also admitted to probate in England along with the will and codicil thereto. Joyce, J., held that the will and codicil and holographs constituted a sufficient execution of the power, notwithstanding the latter had not been attested as required by the power, and as they were a sufficient testamentary disposition by the law of Scotland, the testatrix's place of domicil, the court would aid the defective execution. The power was therefore held to have been well executed.

COPYRIGHT—UNPUBLISHED PICTURE—COMMON LAW RIGHT OF OWNER OF PICTURE—INFRINGEMENT—PIRATED COPY—INNOCENT PUBLICATION—DAMAGES.

Mansell v. Valley Printing Co. (1908) 1 Ch. 567 is a useful case, as illustrating the fact that altogether apart from copyright statutes the owner of a picture has rights in his property which cannot safely be interfered with. The plaintiff in this case had procured to be painted for him two pictures for the purposes of his trade, for which he paid £43. These pictures were surreptitiously copied by a servant of the plaintiff, who subsequently sold the copies as original productions to the defendant company, who purchased them *bonâ fide*, and thereafter, without any notice of the plaintiff's rights, proceeded to make and publish copies thereof. The pictures of the plaintiff had never been published

by him, nor had he registered them under the Fine Arts Copyright Act (25-26 Vict. c. 68). In these circumstances Eady, J., held that the plaintiff's common law rights had been invaded, and the fact that the defendant had acted innocently was no excuse, and he gave judgment in the plaintiff's favour for £43, and ordered all copies in the hands of the defendants to be delivered up to the plaintiff.

LANDLORD AND TENANT—PROVISO FOR RE-ENTRY—BREACH OF COVENANT—FORFEITURE—NOTICE DETERMINING LEASE—NO RE-ENTRY—ISSUE OF WRIT MAKING INCONSISTENT CLAIMS—UNEQUIVOCAL DEMAND FOR POSSESSION.

Moore v. Ullcoats Mining Co. (1908) 1 Ch. 575 is a case which seems to shew that it may for some purposes still be necessary to be familiar with the old procedure regarding ejectment, and the mysterious personages John Doe and Richard Roe, and the part they used to play in the ancient legal drama. The action was brought by the plaintiffs as executors of a deceased lessor to recover inter alia possession of the demised premises, the plaintiffs claiming that they had put an end to the term for breach of covenant, in pursuance of a proviso for re-entry contained in the lease in that behalf. The defendants had committed a breach of a covenant. On April 29 the plaintiffs gave the lessees notice in writing that they determined the lease, and on May 3 gave notice demanding possession of the premises which it was stated their agent would attend to receive on the following day. It was stated at the trial that the agent attended and possession was refused, but of this no evidence was given. On the 6th May the present action was commenced, and the plaintiffs claimed (1) to recover possession, (2) mesne profits, (3) an injunction to restrain defendants from working the mines on the premises so as to hazard, endanger or occasion loss or damage to the mines, and (4) an order requiring defendants to allow the plaintiffs at all proper times to view state of the mines, (5) a receiver, (6) damages, and (7) costs. The only question discussed in the judgment of Warrington, J., who tried the action, was whether or not the lease had been effectually determined. This point, in the opinion of the learned judge, turned on the question whether the notice of May 3, followed by the writ claiming possession coupled with other relief inconsistent with a determination of the lease, was effectual to terminate the lease. He came to the conclusion that if the writ had been a claim for possession and relief merely

incidental thereto, it would have been equivalent to re-entry, and sufficient to determine the lease, having regard to the old law of ejectment which was based on a supposed entry by the plaintiff, which the defendant was bound to admit as a condition of being allowed to defend; but he thought claims 3 and 4 were consistent with the lease being treated as still subsisting, and, therefore, the claim for possession could not be regarded as an absolute and unequivocal demand of possession, and, therefore, that the plaintiffs were not entitled to possession. We see, however, that an appeal was brought from this decision and after the appeal had been argued several days, the judgment was discharged on consent and the case settled out of court.

WILL—CONSTRUCTION—LEGACY—FORFEITURE CLAUSE—SUBSTITUTED LEGACY—INCIDENTS OF ORIGINAL LEGACY APPLICABLE TO SUBSTITUTED LEGACY.

In re Joseph, Pain v. Joseph (1908) 1 Ch. 599. In this case a testatrix had by a will given to her grandchild a legacy of £1,000 subject to a condition that if she should marry a person not professing the Jewish faith she should, for the purposes of the will, be deemed to have died in the lifetime of the testatrix under twenty-one and unmarried. By a codicil in substitution of the £1,000 a legacy of £1,500 was given to be held in trust for the grandchild for life, with remainder to her issue. The grandchild survived the testatrix and subsequently married a Christian. Was the legacy of £1,500 thereby forfeited, the forfeiture clause not having been expressly made applicable thereto? Eve, J., held that it was, because the legacy of £1,500 being in substitution of the £1,000 legacy, the condition attached to the original applied also, without any express direction, to the substituted gift. Consequently neither the grandchild nor her husband or children were entitled to any interest in the £1,500.

Correspondence.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—

I have frequently heard it laid down as absolutely incontrovertible that it is mathematically true that 2 and 2 make 4, and cannot be equal to 5, and I had supposed that it would be equally impossible to prove that 15 is not more than 14—until I read

the decision of the Supreme Court of Nova Scotia in the case of *The King ex rel. Johnston v. Judge of County Court, etc.*, noted at p. 118 of the current volume. The conviction there referred to appears to have been made on October 21st, and the judges had to determine the apparently simple question in arithmetic as to whether the 21st of October was more than 14 days before the 5th of November following. Now, any ordinary school boy would at once, if he were fairly ready in mental arithmetic, remembering that October has 31 days, go through this process in his mind: From 21st to 31st is 10 days, and then to 5th November, 5 days more, or 15 days altogether. If, however, said boy could only reason by units he might adopt this process: The 4th of November is 1 day before the 5th, the 3rd, 2 days, the 2nd, 3 days, the 1st, 4 days, the 31st Oct., 5 days, and so on backwards till he would arrive at the same conclusion, viz., that the 21st of Oct. is 15 days before the 5th of Nov. Many decisions of our courts are calculated to make people believe that, as administered and interpreted in them, law is often directly opposed to common sense, but it has remained for the Supreme Court of New Brunswick to shew that, as interpreted by it, law is sometimes also opposed to common arithmetic and the plain meaning of ordinary English words.

Yours truly,
BARRISTER.

WINNIPEG, 28th April, 1908.

The Editor, THE CANADA LAW JOURNAL:

DEAR SIR,—

Your contributor of the article "Default in Contracts" at page 298 of your last number, has fallen into some errors as to the case of *Labelle v. O'Connor*. He stated that the court decided that where a purchaser makes default in a contract for the sale of land in which time has been of the essence of the contract, then he forfeits his deposit, but does not forfeit other payments which have been made on account of the purchase money. This question did not arise. Only the deposit had been paid and the court held that the deposit must be returned.

Yours truly,
H. D. GAMBLE.

TORONTO

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Boyd, C., Falconbridge, C.J.K.B., Teetzel, J.]

[April 23.]

MATTEI v. GILLIES.*Motor-car—Negligence of chauffeur—Owner's liability—Scope of employment.*

Action by plaintiff for damages on account of an accident arising from the alleged negligence on the part of the servant of the defendant who was at the time in charge of the motor-car. The case was tried before MABEE, J., and a verdict given for \$450 damages. Appeal to Divisional Court. The finding discredited the evidence of the chauffeur, and if this was correct there was no question as to the propriety of the verdict.

BOYD, C.:—It has been more than once noticed that the idea prevails among some motor-drivers that when once they have sounded the horn they are justified in going at any rate of speed, and that people are bound to get out of their way: see per Lord Alverstone in *Troughlin v. Manning*, 69 J.P. 207; whereas the more salutary rule would be as recommended by the "Considerate Drivers' League," "Assume that it is your business and not the other man's to avoid danger": Pettit on Motor-cars, p. 81.

The facts in this case were such as to require the intervention of a jury to decide whether the injury occurred while the driver was acting within the scope of his authority. The chauffeur, who was employed by Gillies and paid solely for the purpose of attending to the automobile, had general charge and care of it, and, having express permission to take it out on the afternoon of the day in question, he was on his master's business, though he made a detour to give a ride to his friends, according to the doctrine of *Ford v. Morrison*, 6 C. & P. 501, which stands approved in many cases: *Whatman v. Pearson*, L.R. 3 C.P. 422, and *Burns v. Paulson*, L.R. 8 C.P. 567. As said

in *Venables v. Smith*, 2 Q.B.D. 281, "he was on his way home, though he was going in a somewhat roundabout fashion," in order to satisfy his friends; and the motor was intrusted to his general care: *Sleeth v. Wilson*, 9 C. & P. 607.

The learned Chancellor also expressed the opinion that a liberal reading was, under the force of 7 Edw. VII. c. 2, s. 7, sub-s. 41 (O.), to be given to the "responsibility" clause of 6 Edw. VII. c. 46, s. 7. Verdict sustained.

J. M. Godfrey, for plaintiff, *R. H. Grier*, for defendant.

Riddell, J.—Trial.]

SMITH *v.* BRENNER.

[April 28.

Motor-car—Negligence—Frightening horse on highway—Liability of owner for act of servant—Unauthorized detour.

Action for damages on account of injuries received by the alleged negligent use of an automobile owned by the defendant, operated by a chauffeur. The plaintiff and her son were driving in a buggy on a highway when the horse was frightened by an automobile coming at great speed. The horse swerved from the road and dashed the buggy against a tree, causing considerable damage.

RIDDELL, J.:—I am of opinion that there was a clear violation of 6 Edw. VII. c. 46, s. 10, . . . As to the alleged detour, supposing that there was a turning out of the direct route by the chauffeur to get a cigar, I do not think that would render him no longer about his master's business. . . . It is a matter of great regret that such a useful invention as the application of mechanical means to the propulsion of carriages upon the highway should be brought into disrepute too manifest, by the disregard (always silly and often malicious by many of those in charge of such motor carriages) of the comfort and rights of others. Of course the child with a new toy must shew how great a child he is, and how great his toy; but it is to be hoped that if and when the motor like the bicycle, ceases to be a plaything and becomes a business carriage, and the possession of a fine motor ceases to be a mark of distinction, all or at least most of those in charge of such vehicles (for the fool we have always with us) will act as many, to their credit be it said, act now, with a due consideration for others differently and perhaps less fortunately situated.

Province of New Brunswick.

SUPREME COURT.

Full Court.]

[April 30.]

REX v. WARDEN OF DORCHESTER PENITENTIARY.

Criminal law—Jurisdiction—Halifax charter.

Motion referred to the Full Court by HANINGTON, J., for the discharge of the prisoner Seely under a writ of habeas corpus. The prisoner was arrested in the city of Halifax, and convicted in November, A.D. 1903, under Criminal Code, 1892, s. 785, on a summary trial, with his own consent on a plea of "guilty," before the stipendiary magistrate of the city of Halifax, in the county of Halifax, in the province of Nova Scotia, for the offence of burglary committed in the city of Sydney, in the the county of Cape Breton, in the province of Nova Scotia. The motion was made on the ground that the territorial jurisdiction of the stipendiary magistrate of the city of Halifax, being limited to the said city, he had no jurisdiction to convict for an offence committed outside of the said city.

Held, in view of s. 144 of the Halifax City Charter, and s. 6, c. 33, Rev. Stat. Nova Scotia, 1900, which conferred on stipendiary magistrates all the power, jurisdiction and authority mentioned in the Criminal Code, and as the prisoner could be legally charged or committed for trial by the stipendiary magistrate of the city of Halifax, under ss. 554 and 557 of the Criminal Code of 1892, for the said offence, the conditions required by section 785 were complied with and the conviction and imprisonment thereunder was legal and valid.

Lionel Hanington and *O'Hearn* (of Nova Scotia Bar), for the prisoner. *J. Power*, K.C. (of Nova Scotia Bar), for the Attorney-General of Nova Scotia.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] CARBERRY GAS CO. v. HALLETT. [April 13.]

Gas Inspection Act—Liability of consumer to pay for gas when no certificate posted up as required by s. 44 and no test made as provided in s. 34—Obligation of company supplying gas in a place for which there is no local inspector.

Plaintiffs sued for supply of acetylene gas from their works in the town of Carberry. The Department of Inland Revenue

has not prescribed a testing place there pursuant to s. 34 of the Gas Inspection Act, R.S.C. 1906, c. 87. No inspector had been appointed under the Act specially for Carberry, but the inspector at Winnipeg acted for the three provinces of Manitoba, Saskatchewan and Alberta.

Held, 1. Sec. 34 of the Act only makes the sale of gas illegal after notice to the undertaker of the location of the testing place prescribed by the department, and until the connections specified in that section are made.

2. Sec. 44, requiring the posting up of the certificates of tests made by the inspector, does not become operative till s. 34 has been acted on and a testing place prescribed and notified to the undertaker.

3. The penalties provided for by ss. 59 and 60 for failure to procure and post up the certificates of tests required by s. 44, and for selling gas before connections have been made with the testing place, etc., are not incurred when s. 44 has not become operative by notification to the undertaker of the prescribing of a testing place.

PHIPPEN, J.A.:—Ss. 34 and 44 are both subsidiary to s. 31 which limits the obligations therein imposed to undertakers "in any city, town or place for which there is an inspector of gas," and the provisions of ss. 31 to 47 inclusive are not applicable to places for which there is no local inspector.

J. D. Hunt, for plaintiffs. *Elliott and Stackpoole*, for defendant.

KING'S BENCH.

Mathers, J.]

[March 28.

EMPEROR OF RUSSIA V. PROSKOURIAKOFF.

Jurisdiction—Service of statement of claim out of jurisdiction—Writ of attachment—Non-resident foreigner—Detention of goods pending result of suit respecting them.

Application to set aside an order of attachment under which certain goods said to belong to the male defendant had been seized by the sheriff. The statement of claim alleged that the male defendant had, while in the position of treasurer of one of the departments of the Government of Russia, stolen a large amount of the moneys of the plaintiff which had come to his hands and had brought the money into Manitoba where he had bought

certain lands with it, and also the goods seized under the attachment. Amongst other things, the plaintiff asked for payment of the moneys stolen, an order for the delivery or sale of the goods and a declaration that the defendants had no claim to the said lands as against the plaintiff. It appeared that the defendants had left the province before the commencement of the action and their whereabouts were unknown to the plaintiff.

Held, 1. The facts did not bring the case within Rule 201 of the King's Bench Act, R.S.M. 1902, c. 40, or any of its sub-rules, so that it was not a case in which the statement of claim could be served out of the jurisdiction.

2. It could not be said that the defendant had committed a tort in Manitoba within the meaning of paragraph(e) of Rule 201. *Anderson v. Nobles*, 12 O.L.R. 644, followed.

3. A court has no power to enforce a personal money claim against a person who is neither domiciled nor resident within its jurisdiction unless he has appeared to the process or has expressly agreed to submit to the jurisdiction of such court. *Sirdar Gurdyal Singh v. Rajah of Faridkote* (1894) A.C. 670, and *Emanuel v. Symon* (1908) 1 K.B. 302; and, therefore, apart from Rule 202 of the King's Bench Act, the possession by the defendants of property in Manitoba gave the Court no jurisdiction over the defendants in an action in personam.

4. If evidence had been given that the defendants were possessed of property in Manitoba to the value of \$200, it would have been necessary to consider whether, under Rule 202, the statement of claim could be served out of the jurisdiction without previously obtaining leave to serve it. *Gullivan v. Cantillon*, 16 M.R. 644, and also whether the plaintiff's cause of action against the defendant was upon a contract within the meaning of that rule.

Writ of attachment set aside with costs as having been issued without jurisdiction; but, as there was a possibility that the plaintiff might succeed in establishing a claim to the specific chattels seized, an order was made for the detention of them by the sheriff until further order on condition that the plaintiff should always keep the cost of detaining, storing and insuring the goods paid in advance, so as to protect defendants against loss in case the plaintiff should fail to establish his claim, with leave to either party to apply at any time to vary or rescind the order.

O'Connor and Blackwood for plaintiff. *Hudson and Levinson* for defendants.

Macdonald, J.] TRADERS BANK v. WRIGHT. [April 6.
Fraudulent conveyance—Injunction against further transfer by grantee—Suit to set aside fraudulent conveyance commenced before judgment for debt obtained.

Held, that, if a creditor brings his action to recover a debt, and at the same time to set aside a fraudulent conveyance or transfer made by the debtor before recovery of judgment for the debt, he must sue on behalf of himself and other creditors; but that, if he does so, and makes out a sufficient case, he may have an injunction to prevent a further transfer of the property being made by the grantee or transferee, and also forbidding any further transfers of his property by the debtor, pending the trial of the action. The learned judge considered the circumstances in this case warranted the issue of such an injunction.

Minty, for plaintiff. *Mulock*, K.C., and *Armstrong*, for defendants.

Mathers, J.] IN RE GREAT PRAIRIE INVESTMENT CO. [April 10.
Winding-up Act—Application by liquidator to court for directions to proceed against directors for fraudulent acts.

The liquidator of the company, which was in process of voluntary winding up under the Manitoba Winding-up Act, R.S.M. 1902, c. 175, applied, under section 23 of the Act, for a direction as to whether or not proceedings should be taken against a number of former directors of the company to cancel certain shares of the capital stock which they had issued to themselves as bonus or promotion stock fully paid up, without payment of any kind, and to recover the dividends, to the amount of over \$62,000, which they had afterwards paid to themselves on said shares.

Held, that, whilst it was manifestly the duty of the liquidator to take appropriate proceedings to recover the money for the company, the question was not one "arising in the matter of the winding up" within the meaning of section 23, and that no order should be made or formal directions given.

T. R. Ferguson, for the liquidator. *Hoskin*, for shareholders.

Mathers, J.] PULKABECK v. RUSSELL. [April 15.
Registry Act—Purchase and dedication of land for a public highway by the municipality—Priority as against subsequent purchaser who registered his deed first.

In 1897 the defendant municipality purchased from the owner, one Boulton, a strip of land 22 yards wide through the

south-east quarter 13-20-29 West for a public road and took a conveyance thereof, and in 1899 the municipality passed a by-law establishing such strip as a public road and highway and dedicating it for public use as such. The council also spent public money in grading and improving the road and it was used as a public highway thereafter. The by-law was not registered, as required by s. 699 of R.S.M. 1902, c. 116, nor was the conveyance to the municipality registered until 1906. In 1903 the plaintiff bought the quarter section from Boulton without any notice of the defendant's deed and without actual notice of the existence of the road. The conveyance to him did not except the road and he registered it in 1904. This action was brought to have the defendant's deed removed from the registry as a cloud upon the plaintiff's title.

Held, that the deed from Boulton vested the title in defendants, and as soon as they dedicated the road to the public it became vested in the Crown by virtue of s. 622 of the Municipal Act, and that, as the provisions of R.S.M. 1902, c. 150, s. 68, do not apply to the Crown, the plaintiff obtained no title to the road as against the defendants.

Fullerton, for plaintiff. *Hudson*, for defendant.

Mathers, J.]

[April 15.

EMPEROR OF RUSSIA *v.* PROSKOURIAKOFF.

Jurisdiction—Service of statement of claim out of jurisdiction
—*Substitutional service.*

See note of former decision in this action at page 359 for the circumstances and facts.

Application to set aside an order of the referee allowing substitutional service of the statement of claim within the jurisdiction and the service made thereunder. The order objected to had been made partly on the strength of an affidavit of one of the solicitors for the plaintiff relating a conversation which he had with the defendants' solicitor in which it was alleged that the latter admitted the defendants were in Manitoba but refused to give their address. It did not appear that the defendants' solicitor knew at the time that anything he might say would be put in an affidavit and used against his clients.

Held, that it did not appear that the alleged admission had been obtained in a way that would justify its use in an affidavit and that, as there was no other evidence to shew that the de-

fendants were within the jurisdiction, the order allowing service should be set aside.

Held, also, that, as it was not a case in which personal service out of the jurisdiction could be made, no order could be made for substitutional service. *Fry v. Moore*, 23 Q.B.D. 395; *Welding v. Bean* (1891) 1 Q.B. 100.

Blackwood, for plaintiff. *Levinson*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.]

[April 8.

EAST KOOTENAY LUMBER CO. v. CANADIAN PACIFIC RY. CO.

Agreement—Non-liability for damage to property. a consideration—"Property," meaning of.

In consideration of building a siding at the plaintiff company's mill, they entered into an agreement with the railway company freeing them from liability for damage caused by the railway to plaintiffs' property, or the property of any other person on the premises comprised in the siding. Two horses employed in hauling a car from one part of the siding to another were killed by a car being shunted on to the siding by an engine of the railway company.

Held, on appeal, reversing the finding of WILSON, C.J., at the trial, that the word "property" in the agreement was not confined to fixtures and rolling stock, and horses on the premises were properly included.

Davis, K.C., for defendants, appellants. *Sir C. H. Tupper*, K.C., for plaintiffs, respondents.

Full Court.] FOLLIS v. SCHAAKE MACHINE WORKS. [April 8.

Master and servant—Workmen's Compensation Act, 1902—"Dependants"—Costs occasioned by abortive common law action—Set-off—Power of arbitrator to direct taking of evidence on commission.

Plaintiffs at times received money from deceased in his lifetime, but there was no evidence of the money having been sent at regular times or in regular amounts.

Held, on appeal, affirming the judgment of MARTIN, J., that plaintiffs were dependants within the meaning of the term in the Workmen's Compensation Act, 1902.

An action at common law for damages for negligence, resulting in the death of a workman, having failed, and defendants admitting liability under the Workmen's Compensation Act, the trial judge proceeded under s. 2, sub-s. 4, to assess compensation. On the question of the apportionment of costs of the abortive action and of the assessment under the Act, plaintiffs set up their inability under the Act to procure the taking of evidence on commission.

Held, per MARTIN, J., at the trial, that s. 2 of the second schedule, and rules 2, 34 and 81 of the Workmen's Compensation Rules, 1904, give the arbitrator power to direct the taking of evidence on commission.

Joseph Martin, K.C., for defendants, appellants. *G. E. Martin*, for plaintiffs, respondents.

Full Court.]

REX v. SMITH.

[April 10.

Criminal law—Evidence—Proof of blood relationship on a charge of incest.

On a trial for incest, the evidence against the accused was that of the child, a girl of eleven years, and of a woman who had known the accused and the girl living together as father and daughter for some seven or eight months. This evidence was not rebutted.

Held, on appeal, affirming the holding of WILSON, Co.J., that there was not sufficient proof of relationship to justify a conviction.

Maclean, K.C., for the appeal. *Macdonell*, for the accused.

Clement, J.]

IN RE BEHARI LAL.

[April 29.

Immigration Act, 1907 (Dom.)—Delegation of power under Act.

Sec. 30 of the Immigration Act, 1907, empowering the Governor-General, by proclamation, to prohibit the landing of immigrants of a specified class, does not permit the delegation of such power to the Minister of the Interior.

Brydone-Jack and *Woods*, for prisoners. *Macdonell*, for Dominion Government.

Book Reviews.

Roscoe's Digest of the law of Evidence and the practice in Criminal Cases. Thirteenth edition. By HERMAN COHEN. Barrister-at-law. London: Stevens & Sons, Limited, 119-120 Chancery Lane; Sweet & Maxwell, Limited, 3 Chancery Lane. 1908. 937 pp.

A new edition of a standard work and not merely new in bringing the authorities and statutes down to date, but in many respects an improved edition. A small matter, but of practical use is the introduction of the modern practice of inserting the dates of cases cited. Some new subject sections have been added as also two introductory notes. Dead branches have been lopped off where new legislation has rendered some case law absolute; space has also been gained by omitting the abbreviation "*R. v.*" in the title of criminal cases—odd that no one ever thought of doing this before. The editor takes great pride in the index. The reader will not take long to find out that it is all that he claims it to be.

A Compendium of the law of Torts. By HUGH FRASER, M.A., LL.D. Barrister-at-law. Seventh edition. London: Sweet & Maxwell, Limited, 3 Chancery Lane. 1908. 252 pp.

An elementary work for the use of students. Originally compiled as an analysis of the author's lectures to students. Not intended to be used as a help to cramming, but giving a scientific bird's-eye view of a subject so vast that numberless volumes have been written to elucidate its manifold ramifications. This book cannot be too highly commended for the purpose for which it has been prepared.

United States Decisions.

MOUNTING SLOWLY MOVING CAR—SUDDEN JERK, CAUSING INJURIES.—In deciding that to attempt to board a slowly moving car is not necessarily negligent, the Supreme Court of Georgia says, in *Rome Ry. & Lt. Co. v. Keel*, 60 S.E. Rep. 464: "To attempt to mount a slowly moving street car is not neces-

sarily negligent. If while the passenger is getting upon the car the motorman, by producing an unusual and unnecessary jerk, throws him off, a liability against the company may be predicated thereon. Also a sudden acceleration of the speed while the passenger is in the act of getting aboard may be negligent. *White v. Atlanta Consolidated Street Ry. Co.*, 92 Ga. 494, 17 S.E. Rep. 672; *Gainesville Ry. Co. v. Jackson*, 1 Ga. App. 632, 57 S.E. Rep. 1007. In *Ricks v. Georgia Southern & Fla. Ry. Co.*, 118 Ga. 259, 45 S.E. Rep. 268, a recovery was denied because the sudden acceleration of the train had begun and was already dangerous when the plaintiff tried to catch a car rail, which he missed. In the transaction now before us, if safe entrance into the car was reasonably practicable at the time the plaintiff attempted to mount, and the motorman negligently did something to render it dangerous, a liability might be predicated; but, if the attempt was fraught with danger ab initio, and the motorman did nothing to increase the danger, the plaintiff should not recover, though he succeeded in accomplishing a part of what was attempted without actually encountering injury."—*Central Law Journal*.

NUISANCE.—A railway company is held, in *Southern R. Co. v. Com.* (Ky.) 12 L.R.A. (N.S.) 526, to be liable for a nuisance, where it harbours upon its right of way a band of labourers who are boisterous, riotous, and shoot firearms, to the alarm of the neighbourhood and persons passing on the public highway.

STREET RAILWAYS.—A street railway company is held, in *Brockschmidt v. St. Louis & M. R. R. Co.* (Mo.) 12 L.R.A. (N.S.) 345, not to be liable for the death of one who, knowing of the frequent passage of cars along its tracks, takes a position in the path of the cars with his back to those which will approach him, for the purpose of removing dirt from the track, and remains there, without any heed to approaching cars, until he is struck and killed, although the motorman does not sound the gong, and a municipal ordinance requires him to keep a vigilant watch for persons on the track.

TRUSTS — UNREASONABLE DETENTION OF INCOME. — *Held*, in *Angell v. Angell*, Supreme Court of Rhode Island (Jan. 22, 1908), under a deed of trust, providing for payment of the income by the trustee to certain persons "the times,

amounts and methods of such payments being left absolutely in the discretion of the trustee," the trustee's discretion must be exercised reasonably, considering all the circumstances; and is subject to the control of the proper court, on proper proceedings, in case of unreasonable detention of income.

A court of equity will decree the termination of a trust where there is no good reason for its further continuance.

NEGLIGENCE—STREET CAR.—That a street car company cannot escape liability for the injury of a passenger through derailment of a car because the derailment was caused by a brick placed on the track by a stranger, is declared in *O'Gara v. St. Louis Transit Co.* (Mo.) 12 L.R.A. (N.S.) 840, if, by the exercise of the high degree of care and diligence which such corporations must exercise toward their passengers, the motorman could have seen the brick in time to avoid running upon it.

That it is not negligence, as matter of law, to ride upon the platform of a street car, notwithstanding a notice that it is dangerous to do so, and the fact that at the time there is room within the car, is declared in *Capital Traction Co. v. Brown* (App. D. C.) 12 L.R.A. (N.S.) 831, where the company customarily so overloads its cars that passengers must of necessity ride upon the platforms.

Bench and Bar.

JUDICIAL APPOINTMENTS.

Francis Robert Latchford of the City of Ottawa, barrister-at-law, to be a judge of the Supreme Court of Judicature for Ontario, a Justice of the High Court of Justice for Ontario, and a member of the Chancery Division of that court, in the room of Mr. Justice Mabee, appointed Chief Commissioner of the Board of Railway Commissioners for Canada. (May 5.)

Flotsam and Jetsam.

There is a breezy sort of good sense about Lord O'Brien's conduct of judicial proceedings that is very useful sometimes from the point of view of absolute justice. A few days ago,

whilst his Lordship was presiding at Green Street, two persons were indicted for the alleged larceny of a sum of money belonging to a person called John Francis. It was stated by the constable who arrested the prisoners that one of them had in his possession £1 8s. 6d. in silver and 11 d. in coppers, and the prisoner stated that he did not know how it had got into his pocket. The jury acquitted the accused, and his Lordship, blandly addressing the prisoner in whose pocket the money had been found, said: "I suppose you don't object to giving back the money to Francis?" "No, my Lord," said the prisoner, cheerfully. "Quite right," said Lord O'Brien. Thus the little mistake was rectified in so far as it could be, and with the utmost good feeling on all sides.—*Law Times*.

A big husky Irishman strolled into the Civil Service room where they hold physical examinations for candidates for the police force.

"Strip," ordered the police surgeon.

"Which, sor?"

"Get your clothes off, and be quick about it," said the doctor.

The Irishman undressed. The doctor measured his chest and pounded his back.

"Hop over this rod," was the next command.

The man did his best, landing on his back.

"Double up your knees and touch the floor with your hands."

He lost his balance and sprawled upon the floor. He was indignant but silent.

"Now jump under this cold shower."

"Sure an' thot's funny," muttered the applicant.

"Now run around the room ten times. I want to test your heart and wind."

This last was too much. "I'll not," the candidate declared defiantly. "I'll stay single."

"Single," inquired the doctor, puzzled.

"Single," repeated the Irishman with determination. "Sure an' what's all this funny business got to do wid a marriage license anyhow?"

He had strayed into the wrong bureau.—*Everybody's*.

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NO 11.

WHAT PERSONS ARE WITHIN THE PURVIEW OF STATUTES AFFECTING THE ENFORCEMENT OF CLAIMS FOR SERVICES.

1. Introductory.
2. Employés entitled to a preference under the English and Colonial Bankruptcy and Insolvency Acts.
3. ——— under the United States Bankruptcy Act.
4. ——— under other American statutes giving a priority to claims for wages. Generally.
5. Same subject further discussed. Meaning of the word "labourer."
6. Meaning of other single words primarily importing manual work.
- 6a. ——— of groups of words importing manual work.
7. ——— of groups of words composed partly of those importing manual work and partly of those having a wider significance.
8. ——— of words, single or grouped, not importing manual work.
9. Persons entitled to privileges under statutory provisions in Civil Law Jurisdictions. Louisiana.
10. ——— Quebec.
11. Employés within the purview of statutes imposing a personal liability upon stockholders.
12. Same subject. Construction of specific words and phrases.
13. Employés within the purview of statutes which render directors of companies personally liable for wages.
14. ——— of statutes imposing upon principal employers liabilities for the wages of persons performing labour for contractors.
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16. ——— of statutes exempting wages from attachment.
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18. ——— of statutes enabling servants to recover attorneys' fees in suits for wages.
19. ——— of statutes regulating the hours of work.
20. ——— of statutes granting a preference to claims for wages in the administration of decedents' estates.
21. Applicability of statutes to persons other than the servants of the party charged with liability.

1. *Introductory.*—In the last number of this Journal we had occasion to notice a decision by the Manitoba Court of Appeal with regard to the right of certain employés to a lien for their wages under the Builders' and Workmen's Act. In the present article it is proposed to deal comprehensively with the general question which was presented under one of its aspects in the case referred to, viz., what classes of persons are within the purview of enactments by which the common law rights of employés with respect to the recovery of remuneration for their services have been modified. For the purpose of supplementing the English and Colonial authorities on the subject, the writer has drawn freely upon the copious stores of American case-law. The use of that source of information is abundantly justified by the fact that most of the existing Canadian enactments in this field of legislation are modeled upon those which have been enacted in the United States.

The decisions regarding the construction of the clauses by which the scope of statutes of this description in respect of persons is defined are extremely conflicting. This remark is applicable even to the groups of cases concerned with statutes which are directed to the same general objects; and the antagonism is of course still more pronounced if those of a dissimilar, as well as those of a similar type, are included in the comparison. Under these circumstances it is apprehended that the preferable, if not the only feasible, method of dealing with the subject is to take up each of the enactments *seriatim*, and show what construction has been placed upon them. But it will be advisable in the first place to specify the various rules of statutory construction and other elements which are treated as determinative considerations in cases of the kind with which we have to deal.

(a) The rule of statutory construction that the words used by the legislature are to be taken in their ordinary sense.

(b) The rule "that general words are to be restricted to the same genus as the specific words which precede them"¹.

¹ Willes J.—*Fenwick v. Schmalz* (1868) L.R. 3 C.P. 308 (316).

"The general word which follows particular and specific words of the

(c) The kindred rule which is summed up in the phrase, *Noscitur a sociis*¹.

(d) The rule under which "each word used in an enumeration of several classes or things, is presumed to have been used to express a distinct and different idea"². It is obvious that the operation of this rule is, generally speaking, directly antagonistic to that of the two just referred to. In fact, as will be shown hereafter its application to the concrete facts involved in the New York case cited has produced an embarrassing conflict of authorities in that State. See § 7 (f), *post*.

(e) The footing upon which the statute in question should be construed,—whether strictly or liberally. The diverse views entertained on this point by the American courts have been a fruitful source of inconsistency. In this connection reference may be made especially to §§ 4, 11, 20.

(f) The general objects which it may be supposed that an enactment of the kind under consideration was intended to subserve.

(g) The previous course of legislation in the same country or state. The fact that the language of a provision is broader and more comprehensive than an earlier enactment in *pari materia* may sometimes be a sufficient reason for holding the former to be applicable to classes of employés, which were not

same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words." Maxwell, Stat. 4th ed. p. 499. (§ 405 in Endlich's adaptation of this work).

"When there are general words following particular and specific words, the former must be confined to things of the same kind." Sutherland, Stat. Constr. § 268.

¹ "When two or more words, susceptible of analogous meaning are coupled together, they are understood to be used in their cognate sense. They take, as it were, their colour from each other; that is, the more general is restricted to a sense analogous to the more general." Maxwell, Stat. 4th ed. 491. (§ 400 in Endlich's adaptation of this treatise.) This statement was adopted in *Re Stryker* (1899) 158 N.Y. 526; *Wakefield v. Fargo* (1882) 90 N.Y. 213.

² *Palmer v. Van Santvoord* (1897) 153 N.Y. 612, 38 L.R.A. 402.

For a case in which the court proceeded upon the principle, that an intention on the part of the legislature to enlarge the scope of the statute in question was to be inferred from the addition of another descriptive term to those used in the context, see *Copley L. Co. v. Ripon L. & N. Co.* (1886) 66 Wis. 481 (see § 7, note 13, *post*).

within the purview of the former⁴. It is obvious that a court which deals with a case from this standpoint may conceivably be led to conclusions different from those which might have been recited, if the later statute stood alone.

(h) The terms by which the remuneration which is the subject-matter of the statute is described. As will be shown in §§ 4(c), 13, 15, 17, *post*, the use of the word "wages" alone is regarded as an element which is indicative of an intention on the part of the legislature to exclude from the purview of the statute those classes of employés who are ordinarily spoken of as being in the receipt of "salaries."

(i) The nature of the claimant's position, viewed with reference to the question whether it enabled him to protect himself adequately in his dealings with the employer. Although this element has sometimes been adverted to as a ground for confining the application of statutes to employés of the lower grades, it is probably not to be regarded as one which, for purposes of differentiation, possesses an independent force.

2. *Employés entitled to a preference under the English and Colonial Bankruptcy and Insolvency Acts.*—(a) *Scope of these Acts as determined by the reasons for allowing the preference.* It has been stated that the principle upon which a preference has been accorded to the "servants and clerks" of bankrupts is that they suffer more severely than any other creditors from the loss of their employment¹.

(b) *Footing on which these Acts are to be construed.* With regard to one of the earlier Acts it was laid down by one of the Commissioners in Bankruptcy that the provision as to the preference of wages was to be strictly construed². The doctrine

⁴ See, for example, *Weise v. Rutland* (1894) 71 Miss. 933.

See also the extract from the opinion of the court in *Wetherby v. Sawony Woollen Co.* (N.J. Eq. 1894), 29 Atl. 326, § 7(b), *post*. The argument in that case illustrates the conclusion which may be indicated by the course of legislation, both as a factor which justifies an enlarged construction, and as a factor which operates restrictively.

¹ *Ex parte Gee* (1839) Mont. & C. 99.

² *Ex parte Hampson* (1842) 2 Mont. D. & De Gex. 462.

thus propounded was, however, not stated with relation to the scope of the provision, *quoad personas*. It was not alluded to in any of the cases cited in the following subdivision, and there is no indication of its having appreciably influenced any of the conclusions at which the courts arrived. So far as any controlling principle is traceable in those cases, it seems rather to have been that the descriptive expressions are to be understood in their ordinary sense.

(c) *Meaning attached to the specific expressions used to designate the preferred classes of employés.* In the earlier English Bankruptcy Acts the only words used to designate the classes of employés entitled to a preference were "any clerk or servant." By the terms of the Preferential Payments in Bankruptcy Act, 1888, § 1, (which, so far as regards the subject now under discussion, is a re-enactment of the corresponding provision in the Bankruptcy Act, 1883), a priority is allowed to the "wages or salary of any clerk or servant," and to the "wages of any laborer whether payable for time or piece work."

The more comprehensive terms of the latest enactments are apparently to be regarded as indicating an intention to include all servants of the classes specified, irrespective of the duration of their engagements. If this supposition be correct the cases in which it was laid down that the Act of 1825, although its operation was not confined to servants hired by the year^{*}, was not to be considered as being applicable, unless the hiring was of longer duration than a week[†], can no longer be considered as

^{*} (*Ex parte Collyer* (1834) 4 Deac. & Ch. 520, 2 Mont. & Ayr. 29; *Ex parte Humphreys* (1835) 3 Deac. & Ch. 14.)

[†] *Ex parte Crawfoot* (1831) Mont. 270; *Ex parte Skinner* (1833) Mont. & Bli. 417 (see *Ex parte Collyer* (1834) 2 Mont. & A. 29; 4 D. & C. 520 where the report of the earlier case was corrected by the court); *Ex parte Neal* (1829) 1 Mont. & McA. 194. The considerations upon which the court relied in *Ex parte Crawfoot*, *supra*, were that the insertion of the word "clerks" would have been surplusage, if the word "servants" had been used in a general sense; that the phraseology by which the terms of remuneration,—"six months' wages and salary,"—were described could not with propriety be understood as having reference to workmen, who were paid daily or weekly; and that there was no express mention of "workmen" in the Act.

good law. On the other hand, the alterations have evidently not in anywise impaired the authority of any of the earlier decisions which proceeded, as may be supposed, upon the principle that the word "servant" was to be understood in its ordinary legal sense, of a person under the control of the bankrupt with respect to the details of his work*.

In this point of view there has been no abrogation of the doctrines, that a preference cannot be claimed by a partner of the bankrupt[†], nor by persons following a distinct business or profes-

* That a commercial traveler, engaged upon an annual salary was within the description, "clerk or servant," was laid down in *Ex parte Neal* (1829) Mont. & Mac. 194.

A similar ruling with regard to the manager of a cotton mill paid so much a year in weekly instalments was made in *Ex parte Collyer* (1834) 2 Mont. & A. 29, 4 D. & C. 520.

That a city editor of a newspaper employed at a weekly salary under a contract terminable at a week's notice was a servant within the Act of, 1849, ch. 106, § 168, was held in *Ex parte Chipchase* (1862) 11 W.R. 11, 7 L.T.N.S. 290.

That a claimant who had worked during the evening for the bankrupt, and during the day for another person, was entitled to a preference was held in *Ex parte Oldham* (1858) 32 L.T.N.S. 181.

In *Ex parte Homborg* (1842) 2 Mont. D. & DeG. 642, 6 Jur. 898, it was declared that a "seaman" is a servant within the Act.

In *Ex parte Harris* (1845) De Gex, 165, 9 Jur. 497, 14 L.J. Bank. 26, a trader borrowed £550, under an agreement by which the lender was to become his clerk at a salary of £220 a year. The trader agreed to produce his accounts and balance sheets to the lender who was to get in the debts, and alone to draw checks on the banking account. If the balance was in the trader's favour at any time he might draw the amount of it. On payment of the loan, or on proceedings being taken to recover it, the agreement was to be at an end. The lender was to have the option of becoming a partner. Held, that the lender was a "clerk." The contention on the other side was that he was merely a person advancing capital, and that the agreement was only a mode of paying a large rate of interest.

That the preference could be claimed by the servant of a person who at the time of the commission was a "trader," although he was not such at the time when the claimant was hired was held in *Ex parte Gough* (1833) 3 D. & C. 189, Mont. & Bl. 417 (bankrupt had been an architect until about two months before the commission, and had then become a builder).

* *Hickin, Ex parte* (1850) 3 De G. & S. 662, 14 Jur. 405, 19 L.J. Bank. 8. There however, it was held that the claimant, a bookkeeper and cashier, was not a partner, although he had been performing services for several years before any definite agreement as to a salary of a specific amount was made, and the evidence showed that the reason why such agreement had not previously been made was that the employer was engaged in making experiments in a certain manufacture, from which he hoped to derive a considerable fortune, out of which the claimant was to be paid for his services. But it was also proved that he had done his work in consideration of an anticipated salary, and was not looking for his remuneration solely to the profits of the business.

sion', nor by a servant of an independent contractor employed by the bankrupt¹.

It has been denied that a manager is within the purview of the Victoria Companies Act (1885) (No. 851), § 3, in which the phrase "clerk or servant" is defined as including "any clerk, artificer, handicraftsman, journeyman, servant in husbandry, labourer, workman, domestic or menial servant". In the same case, however, such an employé was held to be within the description, "clerk or servant" in the Insolvency Act, 1871, § 113².

In Newfoundland the term "servants" has been held to include all persons who, (not being contractors or mechanics engaged on an occasional or special service), render personal service in the ordinary course of business on the trading establishment of an insolvent³.

¹ In *Ex parte Walter* (1873) L.R. 15 Eq. 412; 42 L.J.B. 49, 21 W.R. 53, it was held that a music master and a drill sergeant, engaged by the term to attend a school twice a week at a fixed rate per hour or per lesson, were not "clerks or servants." Their attendance was deemed rather to be of the same nature as that of a surgeon or apothecary.

That an accountant employed at a fixed salary to keep the books of a trader was not a "servant or clerk" within the meaning of the Act of 1849 was held in *Ex parte Butler* (1857) 28 Law Times O.S. 375.

² In *Ex parte Ball* (1853) 3 De G., Mac. & G. 155; 17 Jur. 198; 22 L.J., Bank. 27, it was held that the phrase "labourer or workman of such bankrupt" in § 169 of the Act of 1849, did not include "drawers" employed in mining to assist colliers, to whom the work was let out at a certain price per score baskets. The evidence showed that each collier had a "drawer" attached to him, whom he brought when he was himself hired, and whom he paid out of his own earnings, according to an agreement made without the privity of the bankrupt, and that the colliers discharged the drawers as they saw fit, without interference by the bankrupt.

³ In *re Intercolonial S. & R. Co.* (1887) 13 Vict. L.R. 896; 9 Austr. L.T. 76. The *ratio decidendi* was that the descriptive words were used in a descending order, according to rank, and therefore could not be construed as, comprehending a class of employés higher than "clerks."

⁴ The decision proceeded on the ground that the descriptive words were intended to include all the employés in the sole service of the debtor, and paid by salary or wages, as distinguished from those hired to work by the piece, and that these words were indicative of a division of employés into two main classes—one consisting of those whose duties were mainly mental and clerical, the other composed of those whose duties were mainly manual and physical. On the facts this ruling agrees with the English decision, *Ex parte Collyer*, cited in note 5, *supra*.

⁵ In *re Insolvency of Ridley* (1876) Newfoundl. Rep. (1864-1874), 351. ("skinners" and "cullers" allowed in preference under § 22 of the Act.)

(a) *Scope of statutes considered with reference to the character of the remuneration.* By the explicit provision regarding piece-work which is inserted in the two latest of the English Bankruptcy Acts a decision in which the Act of 1825 was declared not to be applicable to persons employed on that footing, has been definitively overridden¹².

The doctrine of that decision, however, had already been discarded in a case controlled by the Act of 1869, which does not expressly include employes working by the piece¹³.

Having regard to the broader phraseology of the existing enactment it is perhaps open to question, whether the English Courts would now follow the doctrine, adopted with reference to the Act of 1849, that a clerk paid by commission on goods sold by him was not entitled to a preference¹⁴.

¹² *Ex parte Grellier* (1831) Mont. 264. Rev'g. Mont. & Mac. 45. This case was followed in two of the Australian Provinces, with relation to statutes which did not expressly include persons working by the piece. *In re Murray* (Victoria: 1874) 5 Austr. J.R. 3 (Insolvency Act, 1871, § 113): *Re Whittell* (§ 848) Legge Rep. (New So. Wales) 441 (Insolvency Act, 1842).

The more recent of these cases, it will be observed, antedated the decision in *In re Allsopp* (1875) 32 L.T.N.S. 443, by which workmen by the piece were admitted to the benefits of the English Acts. See next note.

In re Holyoke (1857) 35 W.R. 396, (decided under § 40 of the Act of 1883), a man who had formerly acted for the bankrupt as general foreman of a brick yard, entered into an agreement with him by which he undertook to manufacture bricks by piece work, receiving so much per thousand for the bricks produced, out of which the wages of the men who worked under him were to be paid. It was shown further that the bankrupt had paid the workmen who did certain parts of the work and that the claimant continued to act as general manager of the brick works, and that he was liable to be discharged at a week's notice by the bankrupt, who had also the right to discharge and engage all men working under the contract, and to make alterations in the rate paid per thousand for the bricks. *Held*, that he was within the description "labourer or workman" in § 40 of the Act of 1883.

¹³ *In re Allsopp* (1875) 32 L.T.N.S. 43. There a miner employed to get ironstone out of a mine for which he was paid by the yard or ton, had under him to assist in the work other men for whose wages he alone was responsible, but he was bound to conform to the regulations in force at the time, by which he was obliged to work a stated number of hours per day, and was subject to be dismissed at a moment's notice for misconduct, and could not leave or absent himself without the consent of the manager.

¹⁴ *Ex parte Simmons* (1858) 30 L.T. 311.

In Victoria it has been held that the words "clerk or servant" in the Insolvency Act, 1871, §113, (a provision worded similarly to the *earlier* English Acts), do not include a commercial traveller paid by a percentage on his sales. *Ex parte Tomlin* (1885) 11 Vict. L.R. 304.

It may also be observed, that in some American cases it has been held

3. — under the United States Bankruptcy Act.—(a) *Scope as determined by the reasons for allowing the preference.* In a case decided with reference to the Act of 1867, the court remarked that it was to be regarded as embracing those classes of employés who, under normal circumstances, are dependent for their subsistence upon their wages or salaries exclusively, and whose probable necessities entitle them to special protection¹.

(b) *Footing upon which this Act is to be construed.* The present writer has not found any explicit expression of opinion with regard to the question, whether the provision in this Act regarding the priority of wages should be strictly or liberally construed. But as the Supreme Court of the United States has definitely adopted the doctrine that statutes creating specific liens for labour are to receive a liberal construction², it may reasonably be assumed that the Bankruptcy Act, so far as it relates to the preference of the claim of servants, would also be construed on this footing.

(c) *Meaning attached to the specific expressions used to designate the preferred classes of employés.* The expressions "workmen, clerks, or servants," as used in the existing Act have not been defined by the legislature³, and so few cases involving their construction have as yet been decided that the scope which will ultimately be ascribed to them is a matter of

that the expression "wages" does not include remuneration paid in the form of commissions. *People v. Remington* (1887) 45 Hun. 329, Aff'd. 109 N.Y. 631 (memo.) (see § 7(f), *post*); *Re Mayer* 101 Fed. 227.

¹ *Re Rose*, 1 Am. Bkry. R. 68. The conclusion which the court deduced from the principle thus laid down was that an independent contractor is not within the purview of the statute. But this deduction may more properly be referred to the more general considerations referred to in § 21, *post*.

² *Flagstaff Mining Co. v. Cullins* (1881) 104 U.S. 176.

³ In two cases it has been held that the meaning of these words is not controlled by the definition of the expression "wage-earner" which is given in § 1(27), viz., "an individual who works for wages, salary, or hire at a rate of compensation not exceeding \$1,500 per year. That definition, it is considered, refers only to the section by which "wage-earners" are excluded from the list of the parties against whom an involuntary petition may be filed. *Re Scanlon* (1899) 97 Fed. 26; *Re Carolina Cooperage Co.* (1899) 96 Fed. 950.

great uncertainty. The application of the familiar rule with respect to the construction of statutory words derived from a foreign enactment would naturally lead American judges to treat the English cases as authorities of a strongly persuasive force, so far as regards the meaning of the words "clerks" and "servants." On the other hand, it is only to be expected that the Federal Courts should be greatly influenced by the general trend of opinion in those State Courts which have shown a disposition to affix to the words "servants" and "employés," as used in the statutes discussed in §§ 5-8, a more restricted meaning than they bear in England. The influence thus indicated is possibly accountable, in some degree at least, for two decisions to the effect that a travelling salesman is not entitled to a preference¹.

The same remark is perhaps applicable to two cases in which priority was refused to the claims of directors of companies who had acted as general manager. The position of such persons was considered to be that of representatives or vice-principals, exercising a supreme authority over the corporate affairs².

(d) *Scope of Act, considered with reference to the character of the remuneration.* It has been held that a claim for commissions by an employé engaged outside his employer's store in procuring customers, under an agreement for the payment of

¹*In re Scanlon* (1899) 97, Fed. 26, the broader meaning of the word "servant" was deliberately repudiated, and it was held that the petitioner was neither as a "workman," "clerk," or "servant." This decision is directly opposed to that in the English case of *Ex parte Neal*, cited in § 2, note 5, *ante*.

For the other decision excluding employés of this class from the benefits of the Act, see *Re Greenwald* (1900) 99 Fed. 705.

It has been held that the term "clerk" is not confined to its strict lexicographical meaning of a person employed to keep records or accounts, and that it includes also a salesman employed in a shop or store. *Re Flick* (1900) 105 Fed. 503. But in *Re Scanlon*, *supra*, this popular American sense of the term was considered to be inadmissible in construing the Act.

²*Re Grubbs, W. D. Co.* (1899) 96 Fed. 183, (director and general manager of a mercantile corporation); followed in *Re Carolina Cooperage Co.* (1879) 96 Fed. 950 (president of business corporation). The conclusion thus arrived at is antagonistic to that which was adopted in the English decision, *Ex parte Collyer* (1834) 2 Mont. & A. 29, 4 D. & C. 520.

weekly wages and an additional sum for commissions, is not entitled to priority as "wages" ¹

4. — under other American statutes giving a priority to claims for wages. Generally.—(a) *Scope as determined by the reasons for their enactment.* The considerations by which the legislatures are said by the courts to have been influenced in enacting these statutes have reference both to the welfare of the employés and to that of the employer.

On the one hand they are viewed as being intended to afford an additional security to those classes of employés who are the least able to protect themselves against loss ¹, and whose remuneration is in a special sense necessary for the support of themselves and their families ¹. They are not "designed to give a preference to the salaries and compensation due to officers and the employés occupying superior positions of trust or profit" ².

On the other hand it has been stated that one of their objects is "to prevent those persons whose labour is indispensable to the continuance of the business of the employer from abandoning it," and thus obviate that "sudden and general desertion" which "would in many instances result in complete ruin to all concerned" ³.

(b) *Rule of construction applied in determining the scope of these statutes.* The doctrine laid down in most of the cases in which the point has been specifically referred to is that statutes

¹ *Re Mayer*, 101 Fed. 227.

² For cases in which the notion that the employé in question did or did not belong to a class which required protection was mentioned as a factor which operated in favour of or against his claim, see *Seventh Nat. Bank v. Shenandoah I. Co.* (1887) 35 Fed. 436; *Pennsylvania & D.R. Co. v. Leuffner* (1877) 84 Pa. 168.

³ For allusions to the significance of this factor, see *Boston & A.R. Co. v. Mercantile T. & D. Co.* (1896) 82 Md. 535, 38 L.R.A. 97; *Palmer v. Van Santvoord* (1897) 153 N.Y. 612; *Pennsylvania & D.R. Co. v. Seuffner* (1877) 84 Pa. 168; and the case cited in the next note.

⁴ *Re Stryker* (1899) 158 N.Y. 526.

⁵ *Navigation Co. v. Central R.R. of N.J.* 2 Stew. 252, quoted with approval in *Watson v. Watson Mfg. Co.* (1879) 30 N.J. Eq. 588.

of this type are to be liberally construed*. This doctrine, however, is to be taken as being subject to the limitation implied in the statement that "as legislation of this character confers upon a class of persons having a specific contractual relation with corporations new and unusual privileges and securities at the expense of other creditors whose distributive share of the assets is diminished, it is in derogation of the common law, and should not be extended to cases not within the reason as well as within the words of the statute"†.

(c) *Scope of statutes, considered with reference to the character of the remuneration.* In New York the Court of Appeal has taken the position that the expression "wages," as used in a statute granting a preference to the "wages of employés, operatives, and labourers," is to be regarded as connoting only such

* For case affirming this doctrine, see *Flagstaff Mining Co. v. Cullins* (1881) 104 U.S. 176; *Seventh Nat. Bk. v. Shenandoah I. Co.* (1887) 35 Fed. 436; *Heckman v. Tanner* (1900) 184 Ill. 144, 56 N.C. 361; *Bass v. Doerman* (1887) 112 Ind. 390; *McLaren v. Byrne*, 80 Mich. 275.

† In *Palmer v. Van Santvoord* (1897) 153 N.Y. 612, 38 L.R.A. 402, the court remarked that the New York statute granting preferences to employés of insolvent corporations "proceeds upon a broader policy as to the persons to be protected than has been attributed to the acts imposing liability upon stockholders."

In *In re Black* (1890) 83 Mich. 513, the court, adverting to certain decisions cited by counsel, which involved the construction of enactments relating to the personal liability of stockholders for the debts of corporations, observed: "In all such cases a strict construction must be placed upon the statutes, because, although remedial, they are in derogation of the common law, and impose liabilities where none existed before. But the statute under consideration creates no new liabilities. It is merely a statute regulating the distribution of insolvent estates. It does not depend upon any constitutional provisions to authorize it. It regards the remuneration of labour performed for an employer as more worthy of payment than mere merchandise debts or other unsecured claims against an insolvent debtor. Its merits are of the same nature as those which prefer debts due to the United States or to the State, and debts due for the last sickness and funeral expenses, in insolvent estates of deceased persons, and I think it should have a just and liberal construction."

In two States it has been categorically laid down that statutes creating liens are to be strictly construed. *Hinton v. Goode* (1584) 73 Ga. 233; *Flemming v. Shelton* (1884) 43 Ark. 168.

A similar view seems to prevail in Maryland. See *Boston & A.R. Co. v. Mercantile T. & D. Co.* (1876) 82 Md. 535, 38 L.R.A. 97, § 8(c), *post*. But the expression of opinion in that case is not direct and explicit.

The rule of strict construction has also been adopted under the Civil Law. See § 9, *post*.

* *Re Stryker* (1899) 158 N.Y. 526, referring to *People v. Remington* (1887) 45 Hun. 329, *Aff'd* 109 N.Y. 631 (memo.).

remuneration as is paid for manual labour'. On this ground it has been held that a preference could not be claimed for the fees paid to an attorney-at-law for services rendered under occasional retainers, nor to the commissions of a selling agent, nor to the remuneration of an employé performing work of such a character that the amount stipulated to be paid for it would, in ordinary parlance, be designated as "salary". In the case cited the use of the word "wages" was treated as an element corroborating an inference which was also deduced from the collocation of the terms by which the preferred classes of claimants are described. See § 7(f), *post*.

In a New Jersey case also, the fact that the statute in question referred to "wages" as the subject-matter of the preference granted, and made no specific mention of "salaries," was mentioned as an element corroborating the inference drawn on independent grounds, that the statute did not cover the *officers* of a corporation*.

(d) ——— by the nature of the business or work with relation to which the services were rendered. In some instances in which the word or words under review were clearly an apt description of employés of the class to which the claimant belonged, the specific ground upon which his right to the preference was contested was that his services were not rendered in connection with the kind of business or occupation to which the statute had reference".

* *Re Stryker* (1899) 158 N.Y. 526, Aff'd. 73 Hun. 327.

* *People v. Remington* (1887) 45 Hun. 329, Aff'd. 109 N.Y. 631 (memo.).

* *Weatherby v. Saxony Woollen Co.* (N.J. Eq. 1894) 29 Atl. 326 (see § 7 subd. (b), note 000).

"In *Schilling v. Carter* (1886) 35 Minn. 287, N.W. , it was held that farm labourers were not within a statute for the protection of "mechanics, labourers and others," the decision being based upon the ground that the context clearly indicated that only employés connected with "works, manufactory or business" were within the purview of the enactment.

By § 2 of New York Laws, 1897, ch. 415, (Labour Law), it is declared that, the term employé "shall be taken to mean a "mechanic, workingman, or labourer" who works for another for hire. It was held that firemen were not within the purview of the Act, as it was not applicable to persons holding the municipal positions which are included in the classified

(e) ——— to the fact that the employer is or is not a corporation. It is clear that no preference should be allowed,

lists of the Civil Service Law, who receive salaries, not wages, and who enjoy rights and privileges which differentiate them from labourers. *People v. Sturgis* (1903) 79 N.Y. Supp. 969, 78 App. Div. 460.

It has been held that a statute declaring a lien in favour of persons performing labour in connection with "logging" covers, cooks and blacksmiths in logging camps. *Winslow v. Urquhart* (1875) 39 Wis. 260; *Breault v. Archambault* (1876) 64 Minn. 420.

On the other hand it was held in *McCormack v. Los Angeles Water Co.* (1870) 40 Cal. 185, that a man hired to cook for the labourers engaged in constructing a reservoir, although he was a "labourer" was not within a statute giving a lien to persons who performed labour or such a work. The court was of opinion that the scope of the statute was limited to labourers whose services had relation to the actual work of construction.

The Michigan statute which gives a lien to any person who does work in connection with the lumbering industry expressly declares that the word "person" is to be understood as including "cooks, blacksmiths, artisans, and all others usually employed in performing such labour or services." Comp. L. § 10756.

The following decisions were rendered with relation to the Pennsylvania Act of April 9, 1872, and its supplements. In the original Act a lien was declared in favour of money due for "labour or services rendered by any miner, mechanic, labourer, or clerk," from any person or company employing them, either as owners, lessees, *contractors*, or underowners of any works, mines, manufactory or other business." In the supplements the Act was expanded as to include an exhaustive list of twenty-five specific classes of employés.

In *Pfaender v. Hoffman*, 4 W.N.C. 171, a skilled florist was held not to be within the descriptive clause, "any miner, mechanic, labourer, or clerk." The *ratio decidendi* was that the statute was confined by its express terms to the employés of the owners or lessees of "works, mines, manufactories" or other industries *ejusdem generis*.

This is also the explanation of the decision that the term "labourer," as used in this statute, does not include a hotel cook. *Sullivan's Appeal* (1872) 77 Pa. 107; *Allen's App.* (1873) 81 Pa. St. 30; 77 Pa. St. 107; nor professional baseball player. *Kercher v. Sulliran* (1884) 2 Chest. Co. Rep. 461.

The phrase "clerks employed in stores and elsewhere," is held not to embrace a travelling salesman paid by commission. *Mulholland v. Wood* (1895) 36 W.N.C. 140, 31 Atl. 248, 166 Pa. 486.

That a man engaged in soliciting orders for, and selling the product of, a mine on commission, was not a "miner," was held in *Willauer's Estate* (1882) 1 Chest. Co. Rep. 533.

A girl employed in a "concert saloon" was held not to be within the description, "any servant girl at hotels . . . restaurants . . . or any other servant and helper in and about said houses of entertainment." *Cleveland v. O'Neill*, 4 C.P. Rep. 148.

But in *Weaver v. Wheaton*, 2 Pa. Co. Ct. 425, a bartender in a hotel was allowed a priority under this clause.

The general doctrine has also been adopted, that this Act contemplates a business that is complete and independent, and of a fixed and permanent character, as opposed to a temporary employment that is merely incidental to a particular branch of business. The decisions from this standpoint are as follows. *Pardee's Appeal* (1882) 100 Pa. 408 (cutting saw logs and driving them on a stream to the place of manufacture, not a "business" within

where the claim is founded on the performance of work in relation to a specific kind of business, and the only employés connected with that business who are designated by the statute in question are those in the service of corporations¹¹.

(f) ——— to the exhaustive character of the enumeration of the preferred classes of employés. An application of the rule of statutory construction, *Expressio unius est exclusio alterius*, requires the conclusion that, if the statute in question enumerates a considerable number of classes of employés, the legislature did not intend that any other classes should be benefited¹².

(g) *Preference of employés of corporations who are also stockholders.* It has been laid down that an employé of a corporation, if he is otherwise within the purview of a statute of

the Act); *Llewellyn's Appeal* (1883) 103 Pa. 458 (mechanics and labourers, whose services were rendered in the repair and equipment of a plant preparatory to the production of pig iron,—held not to be entitled to a preference out of the property of the manufacturer); *Wolf v. Krick*, 17 Pa. Co. Ct. 118 (person who performed labour in the equipment of a manufactory under the employment of the persons who proposed to carry on the manufacturing business, held not to be entitled to a preference out of the assets of such persons); *Pacific Guano Co. v. Kuhns*, 7 Pa. Dist. R. (preference not available to the employés of a log jobber, or of a railroad or building contractor).

In *Gibbs & S. Mfg. Co.'s Appeal* (1880) 100 Pa. 528, it was held that the employés of a man who undertook the drilling of oil-wells were not working for a "contractor" as that word is used in the original Act. The position of the court was that this word applicable only to persons employed by the owner or lessee of the mine or works to produce the mineral or the article manufactured, as the case may be, and "does not embrace those who undertake to perform some special service in the construction of works, or the opening of mines preparatory to their being operated."

But it is perhaps open to doubt whether a similar construction would be placed upon a provision in which phraseology of a less special character was employed.

¹¹ That a bookkeeper employed by an individual engaged in the saw mill business is not within a statute which allows a lien to bookkeepers and other employees of "merchants, transportation companies and corporations," was held in *Warburton v. Coumbe* (1894) 34 Fla. 212.

¹² In *Thomas v. Washbrough* (1900) 24 Pa. Co. Ct. 419, the court refused to allow a preference to a man performing services as the janitor and trainer of an athletic association, the *ratio decidendi* being that in the Pennsylvania Act of May 12, 1891, there was no mention of persons performing such services, and that the claimant could not be placed in any of the classes of employés which were specified.

this description, cannot be excluded from its benefits on the ground that he is also a stockholder¹², or a director¹⁴.

5. Same subject further discussed. Meaning of the word "labourer."—A class of employés which is always specified in statutes of this type is that composed of "labourers" or "persons performing labour." In its widest sense, the term "labour" may be said to embrace every form of human exertion, whether mental or physical. But, as commonly used in everyday language, it conveys the idea of work which is entirely or principally performed with the hands. This is also the signification commonly ascribed to it by American judges in construing these statutes¹. Accordingly the benefit of a provision which grants a preference or lien in favour of a "labourer" can be claimed by such employés as the following: A person hired as a clerk, bar-tender, and boy of all work in a grocery and liquor store²; a mailing clerk in a newspaper office, whose work consists in addressing and despatching the papers to the subscribers and in attending to their delivery³; a driver of a milk wagon⁴; a cook in logging-camp⁵;

¹² *Conlee L. Co. v. Ripon L. Co.* (1886) 66 Wis. 481.

¹⁴ *Re Armleder* (1900) 11 Ohio C.D. 320.

This general rule is of course not applicable in a case where the employing corporation has not been legally organized. *Fay v. Eagan* (Wis.), 71 N.W. 895.

¹ In *Hinton v. Goode* (1884) 73 Ga. 233, the court, in discussing the meaning of the word as used in § 1974 of the Georgia Code, the court observed: "Labourers, as used in the statute, mean what were generally and universally known as labourers at the time of the passage of the Act. A labourer is one who works at a toilsome occupation—a man who does work requiring little skill, as distinguished from an artisan—sometimes called a labouring man. (Webster.) Clerks, agents, cashiers of banks, and all that class of employés, whose employment is associated with mental labour and skill, were not considered labourers, and were not intended by the statute to be embraced therein as labourers, so as to have a lien for their wages."

² *Oliver v. Boehm* (1879) 63 Ga. 172 (short judgment: no argument).

³ *Michigan T. Co. v. Grand Rapids Democrat* (1897) 113 Mich. 615.

⁴ *Wilbur v. Henkins*, 17 Pa. Co. Ct. 222. (Pa. Act of May 12, 1891, granting a preference to "hand labourers, including farm labourers or any other kind of labour.")

⁵ *Winslow v. Urquhart* (1875) 39 Wis. 260; *Breault v. Archambault* (1876) 64 Minn. 420 (cook and assistant cook entitled to lien).

It should be observed that in these cases it was not disputed that the

a blacksmith engaged in shoeing horses and repairing appliances used by the labourers in such a camp^{*}; a man employed to attend a bar, wash bottles, unpack goods, sweep out the bar-room, and do everything that is required of him¹. There is also explicit authority for the doctrine that a servant engaged to do work which is essentially manual is a "labourer," although the work may be such as cannot be performed without the exercise of special skill. In this point of view it is considered that a preference should be accorded to such employés as type-setters, cylinder-feeders, and pressmen in a printing-office². The position has also been taken that, while a person who merely discharges the functions of an architect, to the extent of drawing the plans of a building, is not within the purview of a statute granting a lien for "work" or "labour" in respect to that building, such a statute embraces a person who not only furnishes the plans for the building but also superintends its construction³.

claimants fell under the generic description "labourers." The actual point upon which they turned was that they were engaged in a common enterprise with the men who handled the logs. They are in conflict with *McCormack v. Los Angeles Water Co.* (1870) 40 Cal. 185, where it was held that a man hired to cook for men engaged in constructing a reservoir was not entitled to a lien on it.

^{*}*Breault v. Archambault* (1876) 64 Minn. 420.

¹*Lowenstein v. Myer* (1901) 114 Ga. 709. The mere fact that a part of his duties was the keeping of the books was deemed not to be sufficient to exclude him from the benefit of the statute.

²*Heckman v. Tammen* (1900) 184 Ill. 144. The court said: "To so construe the statute as to limit its benefits to mere menial servants performing the lowest forms of labour requiring no skill, would, we think, do violence to the meaning of the Act and leave the evil intended to be cured to remain in existence only slightly mitigated. While we are disposed to hold that the statute must be confined to those who perform manual services, still it cannot be confined to such services only that require no skill in the performance of them."

³*Bank of Pennsylvania v. Gries* (1860) 35 Pa. 423. Alluding to the functions of the claimant the court said: "This is work often done by the master-mechanic, and is as essential to the due construction of a building as is the purely mechanical part. . . . A mere naked architect, and who may be such without being an operative mechanic, who draws plans in anticipation of buildings usually, to enable the builder to determine the kind he will erect, could hardly be supposed to be within the Act which provides a lien for work 'done for or about the erection or construction of the building.' But very distinguishable from this, is the case of a party employed to devote his entire time to a building, and

On the other hand a provision of this tenor is not applicable to a civil engineer¹⁰; nor to a professional chemist in the employ of an iron company¹¹; nor to the secretary and treasurer of a company¹²; nor to a clerk of a hotel¹³; nor to a clerk in a mercantile establishment¹⁴; nor to the editors and reporters of news-

who draws the plans for every part of the work, and directs its execution according to such plans and specifications. This is labour—mechanical labour of a high order—contributing its proportionate value to the beauty, strength, and convenience of the edifice. Why is this not entitled to be considered as meritorious as mere manual labour with the tools of a trade? Both are necessary, or were deemed so to be in this case, to the progress of the building, and were performed in and about its construction.”

The reasoning and conclusions of the court in the above case have been adopted in *Knight v. Norris* (1868) 13 Minn. 473; and *Stryker v. Cassidy* (1879) 76 N.Y. 50, Rev'g. 10 Hun, 18. In the last-mentioned case the court, discussing the effect of a statute granting a lien to “any person who should perform any labour,” said: “This language is general and comprehensive, and its natural and plain import includes all persons, who perform labour, in the construction or reparation of a building, irrespective of the grade of their employment, or the particular kind of service. The architect who superintends the construction of a building performs labour as truly as the carpenter who frames it, or the mason who lays the walls, and labour of a most important character. It is not any the less labour within the general meaning of the word, that it is done by a person who is fitted by special training and skill for its performance. The language quoted makes no distinction between skilled and unskilled labour, or between mere manual labour and the labour of one who supervises, directs, and applies the labour of others. . . . Looking at the whole Act it is plain that it was not passed simply for the protection of labourers, using that word in a restricted sense as designating those who work with their hands, and are dependent upon their daily toil for their subsistence. Mechanics' Lien Acts were originally enacted for the especial protection of this class of persons, but their scope has been greatly extended. Under the Act in question a lien may be created not only in favour of workmen employed by a contractor, but in favour of the contractor also.”

See also *Mulligan v. Mulligan* (1866) 18 La. Ann. 20, which is to the same effect as the cases above cited. See § 9, note 9, *post*.

That a person who superintends construction is within the purview of a statute which grants a preference to anyone who shall do any “work” in respect to a building, and declares that this expression shall be deemed to include labour of any kind, whether skilled or unskilled, was held in *Fischer v. Hanna* (1896) 8 Colo. App. 4,

¹⁰ *Pennsylvania R. Co. v. Leuffer* (1877) 84 Pa. 168.

¹¹ *Cullom v. Lickdale I. Co.*, 5 Pa. Dist. R. 622.

¹² *Fidelity Ins. T. & S. Co. v. Roanoke I. Co.*, 81 Fed. 439 (Va. Acts of March 21, 1877, and April 2, 1879).

¹³ *Ricks v. Redwine* (1884) 73 Ga. 273.

¹⁴ *Hinton v. Goode* (1884) 73 Ga. 233; *Oliver v. Maconb & Co.* (Ga. 1896) 25 S.E. 403.

papers"; nor to a man engaged in soliciting orders for, and selling the products of a mine upon commission"; nor to a man employed to disburse money and pay off workmen engaged in the building of a house". Having regard to these decisions, as well as the general trend of the authorities, it seems impossible to accept as correct the ruling that a travelling salesman is a "person performing labour".

Several cases may be said to proceed upon the general principle that the higher descriptions of supervising employés are not "labourers" in the statutory sense of the term. Thus the courts have refused to recognize the claims of the president of a company who was acting as general manager", of the manager of a company"; of a mining engineer employed on account of his professional knowledge and executive capacity to manage a mine"; of a man employed by a company to superintend its affairs at a place where it was erecting a building"; of the architect and superintendent of a building". But it seems to

¹⁸ *Michigan T. Co. v. Grand Rapids Democrat* (1897) 113 Mich. 615. The court remarked that the labour of this class of employés was intellectual rather than manual—"the work of professional men, rather than the work of labourers, giving that word its ordinary acceptation."

¹⁹ *Willauers' Estate* (1882) 1 Chest. Co. Rep. 533.

²⁰ *Edgar v. Salisbury* (1852) 17 Mo. 271, (construing the Missouri Mechanics' Lien Law, R.C. 1845, p. 733.

²¹ *In Re Lawler* (1901) 110 Fed. 135 (Statute of Washington State).

²² *Seventh Nat. Bank v. Shenandoah I. Co.* (1887) 35 Fed. 436. (Va. Acts of March 21, 1877, and April 2, 1879). The court said: "If the statute had intended to embrace presidents, vice-presidents, general superintendents, general managers, and other like officials, it would doubtless have said so. The prominence of such officials in every company named in the statutes precludes the idea that their distinct existence and claims were overlooked and that they were intended to be embraced in some of the designated classes of employés. They seem to have been purposely omitted; doubtless for the reason that this class of officials are, generally, in a position to protect their interests, and secure their salaries; while the classes included in the statute are not so situated, and are not able to protect themselves against loss."

²³ *Fidelity Ins. T. & S. Co. v. Roanoke I. Co.*, 81 Fed. 439 (same statute).

²⁴ *Boyle v. Mountain Key Min. Co.* (N.M.) 50 Pac. 347.

²⁵ *Smallhouse v. Kentucky, etc., Co.* (1878) 2 Mont. T. 443.

²⁶ *Foushee v. Grigsby* (1876) 12 Bush (Ky.) 75. See, however, the decisions to the contrary effect in note 9, *supra*.

be wholly impossible to reconcile, on any reasonable basis, all the cases concerning the lower grades of this class of employés. Some of the decisions may be said to reflect the broad conception that, for the purposes of these statutes, there is an essential distinction between employés whose functions are entirely or mainly confined to superintendence, and those who actually perform the work in question". Thus it has been held that the benefit of the lien or preference cannot be claimed by an overseer of a farm, in respect of his supervisory functions"; nor to the foreman of works at a tunnel". On the other hand the position has been taken that the expression "labourers" embraces a man employed as a general foreman of the mine to "boss the men, keep their time, and give them orders for their pay at the end of each month"

Employés who in respect to the other incidents of their positions do not belong to the classes to which the term is applicable cannot claim the benefit of the preference on the mere ground that they sometimes performed some manual work as an inci-

* In *Pullis Bros. I. Co. v. Boemler* (1901) 91 Mo. App. 85, it was observed: "The phrase 'wages for labour,' if we construe the words according to their ordinary meaning, defines compensation for either manual labour, or, at most, for any service rendered in performing a necessary detail of a company's business by the employé's personal exertion, rather than for work performed by others under his supervision."

* *Fleming v. Shelton* (1884) 43 Ark. 168 (decided on the ground that a statute, *Gault's Dig.* §§ 4079-97, giving a lien to "labourers" must be strictly construed); *Rusk v. Billingdale* (1871) 44 Ga. 308 (Act of 1879), (the court remarking that the rule was subject to an exception in cases where the overseer worked as a common day labourer also); *Hester v. Allen* (1876) 52 Miss. 162; *Whitaker v. Smith* (1876) 81 N.C. 340; *Isbell v. Dunlap* (1887) 17 S.C. 581.

In the case last cited the court said: "An overseer is one who is employed, not to labour himself, but to overlook and direct the labour of those who are employed to do the manual work of planting, cultivating and gathering a crop, and it could be a confusion of terms to call such a person a labourer."

* *Pratt's Appeal* (1886) 1 Sadler (Pa.) 12, 1 Cent. 218.

* *Capron v. Strout* (1876) 11 Nev. 304. The court refused to express an opinion regarding the right of a general superintendent to claim the lien; but remarked that the cases were, at all events, distinguishable. The latter of these views is sustained by the analogy of the decisions which relate to statutes in which the expression "work and labour" is used. See § 6a, *post*.

dent of the discharge of their duties". Manual work so performed does not constitute their normal employment, and, as a general rule, it is only when they have been hired to do that

* In *Oliver v. Macon Hardware Co.* (Ga. 1896) 25 S.E. 403, the same court remarked: "Every human being who follows any legitimate employment, or discharges the duties of any office, is, in a very broad sense, a labourer. The president of the United States, the governor of this state, and the justices of this court are all labouring men, in the sense that they do a great deal of hard work, much of which is, indeed, attended with physical and muscular exertion; but at the same time they cannot properly be termed 'manual labourers,' either in the popular sense in which these words are used and understood, or in the sense in which the term 'labourer' was employed in the statutes under consideration." In that case the general principle here indicated was, in the headnote written by the court, expressed in the following language with reference to the particular facts under discussion: "Primarily, a clerk in a mercantile establishment is not a 'labourer,' in the sense in which that word is used in § 1974 of the Code, even though the proper discharge of his duties may include the performance of some amount of manual labour. If the contract of employment contemplated that the clerk's services were to consist mainly of work requiring mental skill or business capacity, and involving the exercise of his intellectual faculties, rather than work the doing of which properly would depend upon mere physical power to perform ordinary manual labour, he would not be a labourer. If, on the other hand, the work which the contract required the clerk to do was, in the main, to be the performance of such labour as that last above indicated, he would be a labourer. In any given case, the question whether or not a clerk is entitled, as a labourer, to enforce a summary lien against the property of his employer, must be determined with reference to its own particular facts and circumstances."

This decision and the arguments by which it was sustained seem to indicate some denature from the position taken in *Richardson v. Langston*, 68 Ga. 658. There it was ruled that an affidavit to foreclose a labourer's lien, in which it was alleged that the defendants, merchants selling dry goods and groceries, were indebted to the deponent "for services rendered as clerk, labourer, and general service in said store," was not demurrable as not sufficiently setting out the fact that the plaintiff was a labourer. From the opinion of the court, which was written by a *dissenting* judge, the court in *Oliver v. Macon Hardware Co.* quoted the following passage: "I do not understand that clerks, or persons doing general service, although they may labour, are therefore labourers, in legal contemplation. If they are to be included in the general term 'labourers,' then I see no limit to the exercise of this extraordinary right of having execution on oath, by all agents and employes, such as cashiers, tellers, and bookkeepers of banks, secretaries, treasurers, bookkeepers, salesmen, and superintendents of manufacturing companies, as well as all the officials of railroads below the president, whether in the offices or on the roads. To enlarge upon class legislation by implication should not be the policy of courts, and especially so where *ex parte* summary remedies are allowed."

An inspector of lumber, although his work requires him to perform a small amount of manual labour, is not a "labourer." *Re Sayles* (1892) 92 Mich. 354, 52 N.W. 637. (How. Mich. Ann. Stat. § 8749m.) The court remarked that what is compensated in such a case "is not the labour, but the judgment and integrity of the inspector. The inspector is nothing less than an arbitrator between the parties, and to hold this class of services within the meaning of the statute would, we think, require that all pro-

kind of work that they are deemed to be "labourers" within the meaning of these statutes". But a person engaged for the specific purpose of performing manual labour as well as work of a higher quality is entitled to a preference, possibly in respect to the whole of his wages, irrespective of the nature of the services by which they were earned"—certainly in respect of

fessional services, as well as the services of the officers of the corporation, should be likewise protected."

See also *Prendergast v. Yandes* (1890) 124 Ind. 159, 8 L.R.A. 849, § 7(c), *post*.

* A man hired to work as general clerk and bookkeeper, and to make himself generally useful, during the reconstruction of a hotel, and afterwards as clerk and steward, was held not to be entitled to a labourer's lien under the North Carolina statute, although he occasionally did some manual work upon the building, was held in *Nash v. Southwick* (1897) 120 N.C. 459.

A "woodsman" who superintended a large number of hands on a turpentine farm, and also worked as a clerk in the employer's commissariat department, was held not to be entitled to a lien as a "labourer," although he did a considerable amount of manual labour in the discharge of his duties. *Cole v. McNeill* (1896) 99 Ga. 250.

That an agent whose principal duty was to collect money due to his employer was not within a statute which prefers debts for "labour" debts, although occasionally, in performance of his duties, he did some manual work in fixing machines, was held in *Clark's Appeal* (1894) 100 Mich. 448.

That the Washington statute creating liens for labour does not cover manual labour performed as an incident to a person's connection with a corporation as stockholder and general manager, his actual incentive being his interest in the expected profits, was held in *Addison v. Pacific Post Milling Co.* (1897) 79 Fed. 459. The allusion to the motive of the claimant in this case, however, seems to introduce a supererogatory factor.

* Thus it has been held that one who not only acts as overseer and assistant superintendent, but performs manual labour in the construction of a building, is within an Act which gives a lien to "all persons" performing labour for the construction of a building. *Williamette F. Co. v. Renick* (1855) 1 Or. 169.

So also a superintendent or foreman of labourers who remains with them, directing their work, and sometimes working himself, is a "labourer." *Texas & St. L.R. Co. v. Allen*, 1 White & W. Civ. Cas. Ct. of App. § 568.

In *Ricks v. Redwine* (1884) 73 Ga. 273, it was conceded that a hotel clerk would have been entitled to a lien, if he had performed manual labour as a part of his duties. But this concession must be interpreted with reference to the general principle embodied in the cases cited in note 29, *supra*.

A practical miller, who was employed by a corporation engaged in building flour mills and in manufacturing and selling milling machinery, and whose duty it was to go from place to place and start new mills or new machinery, erected by the corporation, for the purpose of showing the vendors the practical results obtainable and procuring their acceptance of the mills and machinery, was held to be within a statute, preferring debts for "labour" owing by insolvents. *In re Black* (1890) 83 Mich. 513. (How.

such wages as are due on account of the manual labour alone". It is also clear, both on principle and authority, that an employé who, if he were engaged to perform work of the description indicated by his occupation or trade, would be treated as being outside the privileged classes, is entitled to claim the preference accorded to "labourers" if, as a matter of fact, he performs manual labour".

As to the New Jersey statutes, see § 7, subd. (b) *post*.

6. Meaning of other single words primarily importing manual work.—

(a) "*Workmen*." In one case the Supreme Court of Pennsylvania, adopting the Webster's definition of this word, viz., "one who is employed in any labour, especially manual labour" refused to hold that it was applicable to a civil engineer¹.

Stat. 8749m.) The conclusion of the court was based upon the ground that statutes of this description are to be liberally construed, and that the claimant's functions involved "manual labour and practical demonstration in the operation of machinery to produce the required result—the performance of such services as are usually performed in a flouring mill." But the opinion was also expressed that, if a strict construction should be placed upon the statute, the claim of petitioner would still come within the letter and spirit of the statute.

¹ In *Lawton v. Richardson* (1898) 118 Mich. 669, it was held that the phrase "labour debts," (How. Mich. Stat. § 8749m), did not embrace a claim for work done by an employé in assisting the proprietor of a store to purchase goods for a store of which he expected to be manager after it was started, but that it covered his services rendered in unpacking the goods, marking them and putting them on the shelves, and in performing the ordinary work of a salesman in attending to customers, sweeping out the store, etc., during the time which elapsed before the store was closed by creditors. The *ratio decidendi* was that nearly all the labour performed after the purchase of the goods was not intellectual or professional in its character, but in the main manual.

That the same statute was applicable to the *personal* labour performed by the overseer and custodian of a mine, while in charge of the property of the corporation, was held in *McLaren v. Byrne* (1890) 80 Mich. 275.

² In *Adams v. Goodrich* (1816) 55 Ga. 233, this doctrine was applied with respect to a mechanic. In this case the court seems to have assumed that the term "labourers" was only applicable to persons performing *unskilled* labour—a narrow construction of the term which is not borne out by the other authorities. But the general principle applied is plainly not open to any exception.

"In determining whether a particular clerk, or other employé, is really a labourer, the character of the work he does must be taken into consideration. In other words, he must be classified, not according to the arbitrary designation given to his calling, but with reference to the character of the services required of him by his employer." *Oliver v. Macon Hardware Co.* (1896; Ga.), 25 S.E. 403.

¹ *Leuffer v. Pennsylvania & Delaware R.R. Co.* (1877) 84 Pa. 168, Rev'g. 11 Phila. (Pa.) 548. In the statute there under review, the words

(b) "*Mechanics.*" In its wider sense this term denotes an artisan, mechanic or artificer, or a person who follows a handicraft for his living; in its more restricted sense it is applied to employes of the above descriptions whose work is confined to the making and repairing of machinery². Invariably, therefore, it imports the performance of some kind of manual work. Accordingly it is not applicable to a person who is employed by the owner of a factory to assist him in purchasing machinery, to superintend its erection, and to put the factory in working order, but who does no manual labour himself³; nor to a man engaged in soliciting orders for, and selling the products of a mine upon commission⁴.

(c) *Operatives.* By lexicographers this term is defined as a "labouring man, artisan, or worker in manufactories"⁵. Like the two words discussed in the preceding subsections, therefore, it connotes manual work. See subd. (f), *post*. It has been held applicable to an artisan who makes boots at his own home out of materials furnished by his employer⁶.

(d) *Persons performing labour as operatives.* The notion of a preference extended only to those classes of employes whose work is primarily and essentially of a manual character manifestly inheres in this form of words as in the simple term "labour." Accordingly it does not embrace a traveling salesman⁷; nor the secretary of a manufacturing company, even though as an incident of his duties as secretary, he manages the business and assists in packing and shipping

"workmen" and "labourers" are grouped together. The court, therefore, might have fortified its conclusion by invoking the rule, *Noscitur a sociis*. But the scope of the word was not considered from this standpoint.

² Imperial Dictionary; Century Dictionary.

³ *Crook v. Ross* (1895) 117 N.C. 193.

⁴ *Willauer's Estate* (1882) 1 Chest. Co. Rep. 533.

⁵ Imperial Dictionary; Century Dictionary.

⁶ *Thayer v. Mann* (1848) 56 Mass. 371 (Insolvency Act of 1838, ch. 163).

⁷ *Re Sloan's Estate* (1899) 60 Ohio St. 472; *Davis v. Greenley*, 13 Ohio C.C. 229.

goods'; nor the superintendent of a brewing corporation'. On the other hand it is applicable to farm labourers"; and to salesmen employed in a store".

6a. — of groups of words importing manual work.—(a) All persons doing any "work or labour." This phrase has been held to embrace such superior employés as a civil engineer who surveys routes for and superintends the construction of a railroad¹; a foreman who directs the work of labourers in improving a railroad²; and an overseer in a mine who was under the orders of the general agent of the foreign company which owned the mine, and who personally superintended the manual labour of the miners and directed the development of the property³.

¹ *Green v. Weller*, 3 Ohio C.D. 488.

² *Hanner v. Maumee Brew. Co.*, 6 Ohio N.P. 385. This decision, however, is inconsistent with another, also rendered by a court of inferior jurisdiction, to the effect that a man employed to oversee and manage in all its details the work of a contractor engaged in the business of making streets, grading, etc., and who, when it was necessary, lent a helping hand, was held to be entitled to a preference. *Re Angle*, 1 Ohio N.P. 110.

³ *Re Lowry*, 7 Ohio Dec. 282.

⁴ *Re Assignment of Duhme*, 6 Ohio Dec. 448.

⁵ *Van Frank v. St. Louis C. G. & S.R. Co.* (1902) 93 Mo. App. 412. The theory of the court was that the phrase occurred in the general lien law of Missouri (Rev. Stat. 1899, § 4239), and that this was of a broader scope than another enactment, (Rev. Stat. 1899, § 1006), which was intended to protect "labourers."

⁶ *Sweem v. Atkinson T. & S.F.R. Co.* (1900) 85 Mo. App. 87.

⁷ *Cullins v. Flagstaff Min. Co.* (1878) 2 Utah, 219, (Aff'd. (1881) 104 U.S. 176, L. ed.). In its opinion the Supreme Court of the United States remarked: "His duties were similar to those of the foreman of a gang of track hands upon a railroad, or of a force of mechanics engaged in building a house. Such duties are very different from these which belong to the general superintendent of a railroad, or the contractor for erecting a house. Their performance may well be called work and labor; they require the personal attention and supervision of the foreman, and occasionally in an emergency, or for an example, it becomes necessary for him to assist with his own hands. They cannot be performed without much physical exertion, which, while not so severe as that demanded of the workmen under his control, is nevertheless as really work and labour. Bodily toil, as well as some skill and knowledge in directing the work, is required for their successful performance. We think that the discharge of them may well be called work and labour."

The decision in *Idaho Min. & Mill Co. v. Davis* (1903) 123 Fed. 396 is to the same effect (with reference to Sess. Laws Idaho, 1895, p. 48, § 1).

(b) "*Mechanics and labourers.*" As both the words which are thus coupled together imply persons who perform manual work, it follows that the combination includes only employ  s whose work is exclusively or mainly of that character. It does not embrace a draughtsman'; nor the general manager of a shop'.

(c) *Mechanics, workmen and labourers.* The remark made in the preceding sub-section is also applicable to this combination of terms. Accordingly it does not cover the manager and superintendent of a mining company'; nor a bookkeeper'.

(d) "*Mechanics, labourers and operatives.*" These expressions all import the performance of manual work and do not embrace a civil engineer in the employ of a railway company'.

7. — of groups of words composed partly of those importing manual work and partly of those having a wider significance.—(a) "*Labourers or servants.*" Two decisions with reference to this group of expressions proceed upon the theory that they cover only persons who perform manual labour, and consequently do not confer a right to a preference upon a bookkeeper'; or a traveling salesman'. These rulings appear to be a very strong application of the rule, *Noscitur a sociis*. The writer ventures to express a doubt as to their correctness. However this may be, there is no reasonable ground upon which the phrase can be restricted to persons who perform unskilled labour. Thus it has

¹ *Lineau v. Albright*, 10 P  . Co. Ct. 181.

² *Raynes v. Kokomo L. & F. Co.* (1899) 153 Ind. 315.

³ *Smallhouse v. Kentucky M.S.G. & S.M. Co.* (1876) 2 Mont. 443.

⁴ *Cochran v. Baker* (Sup. Ct. 1899) 30 Misc. 48, 61 N.Y. Supp. 724. The provision in question (N.Y. Laws, 1897, ch. 415,    8), uses merely the word "employ  s." But in the definition clause (   2), this expression is declared to mean "mechanic, workingman or labourer."

⁵ *Gulf & B.V. Ry. Co. v. Berry* (Tex. Civ. App. 1903) 72 S.W. 1049.

⁶ *Signor v. Webb* (1892) 44 Ill. 338, denying the applicability both of the Act of June 15, 1887, 3 Stan. & C. Statutes, p. 828, and 61 (settlement of insolvent estates), and of the provision as to preferences in case of voluntary assignments in 1 Starr & C. Stat. p. 1305.

⁷ *Eppstein v. Webb* (1892) 44 Ill. App. 341.

been held that such employés as typesetters, cylinder feeders, pressmen and a printer's bookkeeper are entitled to a preference¹.

(b) *All persons doing labour or service of whatever kind.* By the New Jersey Corporation Act, § 63, as originally framed, only "labourers" were allowed a preference. It was not disputed that this expression was applicable only to those persons who performed manual labour². But the Act, as amended contains a definition clause declaring that the word "labourers" is to be construed as including "all persons doing labour or service of whatever character for, or as workmen or employés in the regular employ of such corporations." It has been held, with reference both to the earlier and the later versions of this statute that neither the president, nor a director, nor any officer, is entitled to a preference³. On the other hand it has been

¹ *Heckman v. Taumen* (1900) 184 Ill. 144, 56 N.E. 361. (Ill. Laws of 1895, p. 242.)

² See the language used by the court in *Weatherby v. Saxony Woollen Co.* (N.J. Eq. 1894), 29 Atl. 326 (note 5, *infra*).

³ In *England v. Daniel F. Beatty Organ & Piano Co.* (1886) 41 N.J. Eq. 4, the court argued thus: "The president of a corporation, under the Act, is and must be a director. He is part and parcel of the organization. There must be employer as well as employed; and the question arises: Does the Act authorize the organization, which is the employer, to employ itself? . . . I am well satisfied that to make favourites of this class would be against the true spirit of the Act as well as against a wise public policy. The spirit of the Act is manifestly to pay 'labourers doing labour or service' . . . and not to give a preference to the individual members of the corporation; and not that they may employ themselves and maintain both attitudes, employer or employé, as their individual gain and the loss of creditors may dictate. And as to the public policy of so extending the construction as is urged, let it be considered how strong the inducement as well as how convenient for every director to be employed 'doing labour or service as a workman or employé' for his company; and let it also be considered what a prolific source of injustice and fraud such construction would prove to be. There are numerous considerations in this direction which will arise to the mind of the thoughtful."

In *Weatherby v. Saxony Woollen Co.* (1894) N.J. Eq. 29 Atl. 326, the court after expressing the opinion that the true doctrine had been stated in *Lehigh Coal & Nav. Co. v. Central R. Co.*, 2 Stew. 252, viz., that "the preference given by the sixty-third section of the Corporation Act is in derogation of the right of creditors to be paid equally, and must not be extended by construction," proceeded thus "officers can only be included in the phrase 'labourers and employés' by construction, and that, too, of a very strained character. It cannot be that the legislature, in any of its enactments respecting preferences, meant to include officers, in the words 'labourers' or 'employés,' for there has been no period in the history of

strongly intimated in one case that the secretary and treasurer of a company, if they are not directors, are within the scope of the amended clause'. If this conception of the scope of the preference should ultimately prevail the effect of the comprehensive definition clause will have been to extend the benefits of the Act to classes of employes who, even under the most liberal construction of the simple term "labourers," have never been regarded as favoured claimants. That clause has also been relied upon as a ground for granting a priority to the wages of a bookkeeper, although he was also a director'; and of a drayman who used his own vehicles and horses for the purpose of performing the stipulated services'. But it seems clear that

legislation upon this subject when these different classes have not been broadly distinguished. The first legislation upon this subject only provided a preference for labourers. By universal consent, this had reference only to those who performed manual labour, of whatever nature, and there was but little difficulty in determining those who were included. But it became manifest to the common understanding that there was another class who did equal service in the interests of corporations and of their creditors, whose vocation was of a different character from that of mere manual labour. There seemed to be no just reason for omitting the latter class from the preference, and the legislature extended the favour which it had given to labourers to this class, and designated them as 'employés.' Surely, it cannot be, since the legislature proceeded in this very cautious manner, by advancing from the use of the word 'labourers' to that of 'employés,' that it meant also to include officers. Note again that the Act provides for the payment of wages due to labourers and employés, for all service, of whatever nature, but makes not the slightest reference to salaries due to officers. The unmistakable difference in the true meaning and proper application of the words 'wages' and 'salaries,' and the exclusion of the latter from the original enactment, and especially from the amendment, render further discussion unnecessary."

* *England v. Daniel F. Beatty Organ & Piano Co.* (1886) 41 N.J. Eq. 470.

¹ *Consolidated Coal Co. v. Keystone Chemical Co.* (1896) 54 N.J. 309.

² *Watson v. Watson Mfg. Co.* (1879) 30 N.J. Eq. 588. The court said: "A carpenter, blacksmith or other mechanic, whose work can only be done with tools, may be regularly employed by a corporation to work for it with his own tools. In such a case I think there can be no doubt that his wages, though largely earned by the use of tools, would be preferred. Corporations engaged in the manufacture of bulky articles, must necessarily, in the conduct of their business, have a large amount of carriage by vehicles done in the transfer of raw material from depots and wharves to their works, and in the removal of manufactured articles from their works to points where they may be delivered to common carriers to be carried to market. . . . The services of carriers of the description of the petitioner were quite as necessary and essential to the continued operations of the defendants as those of any class of workmen rendering labour or service to them. Certainly much more vitally essential than those of a

even the simple expression "labourers" would, in most jurisdictions at least, be regarded as covering such employés. Even the manager of a company, although he is also its president, has been held to be entitled to a lien*.

(c) "*Labourers and employés.*" Two cases which involve the construction of this combination of terms imply an acceptance of the theory that the use of the expression "employé" imports an extension of the scope of the statute beyond that which would be ascribed to it if only "labourers" were mentioned. In one of these cases an employé of a natural gas company, who was designated superintendent, but who was neither an officer of the company, nor its general manager, was held to be entitled to a preference". In the other a preference was

porter, clerk or bookkeeper, and yet they are generally regarded as being clearly within the provision of the statute. It has been held that one of the main purposes of this Act is to prevent those persons whose labour is indispensable to the continuance of the business of a corporation, from abandoning it, and thus suspending its operations, whenever they become alarmed by fear of losing their wages. *Lehigh Coal and Navigation Co. v. Central R.R. of N.J.*, 2 Stew. 252. A sudden and general desertion would, in many instances, result in complete ruin to all concerned. The principal design of this statute is to erect a guard against such disasters. I think it is quite obvious that the petitioner belongs to the class of persons which the legislature intended to protect by the enactment of this statute."

* See *Duryea v. United States Credit System Co.* (N.J. Eq. 1895) 32 Atl. 690. The court relied upon the earlier case of *Weatherby v. Saxony Woollen Co.* (N.J. Eq. 1894) 29 Atl. 326, in which a similar claim had been allowed. It is to be observed, however, that the fact of this allowance is not mentioned in the report itself.

¹⁰ *Pendergast v. Yandes* (1890) 124 Ind. 159, 8 L.R.A. 849. The duties of the claimant were thus stated by the court: "He was himself responsible directly to the company, and had no immediate superior officer except the president and vice-president. His duty was almost wholly confined to superintending the employés under his control, in the discharge of which duty he was required to do a great deal of walking along the pipe-lines; and, when testing gas wells, it was necessary for him to handle wrenches and other tools for a few minutes. But, beyond this, the discharge of his duties did not make it necessary for him to do any physical or manual labour other than such as is ordinarily incident to the superintendency of the employés engaged in such work, although he did occasionally, of his own volition, when work was pressing, and there was scarcity of hands, do some physical labour in the handling of gas pipes, and other work incident to the laying and fitting of them. His salary or compensation was \$100 per month. His duties kept him constantly with the men who were engaged in the manual labour of laying the pipes, and doing the other work herein specified, to see that such work was done properly, and with proper mechanical skill; and, as these men were often separated into different gangs, it was necessary for him to travel back

allowed by one of the inferior courts of Ohio to a traveling salesman employed by a manufacturing corporation at a monthly salary and a commission". But a statute which uses these terms is not applicable to an attorney employed at a yearly salary".

(d) "*Labourers, servants and employés.*" With reference to a statute in which the preferred classes of employés are thus designated, it has been held that a priority had properly been accorded to the wages of a drayman and the salary of the manager of a lumber and manufacturing company".

(e) "*Employés and other operatives.*" It has been held that the indefinite term "employés," as used in this combination has been held to take its color from the more precise expression, "operatives," and consequently that it does not embrace a general superintendent of a company".

(f) "*Employés, operatives and labourers.*" This particular grouping of terms occurs only in the New York enactments which relate to the disposition of the assets of insolvent corporations. It is agreed by the courts of that State that, in spite of its generality, the expression "employés" is to some extent narrowed in meaning by its association with the words with which it is coupled, and that it does not include every person in the employment of a corporation, irrespective of the nature of their service". In this point of view it is considered that a

and forth from one gang to another. There is nothing in the articles of association or by-laws of said company specifying such an office as that of superintendent."

¹¹ *Lewis v. Dawson*, 6 Ohio C.C. 243.

¹² *Latta v. Lonsdale* (1901) 52 L.R.A. 479, 107 Fed. 585 (Sand. & H. Ark. Dig. §§ 1425, 1426).

¹³ *Conlee Co. v. Ripon L. & M. Co.* (1886) 66 Wis. 481. The court said that the right to the preference in the case of the former of these employés was clear, and that the claim of the superior employé, should be allowed on this ground that the words "servants" and "employés" means something more and different than the word "labourers" and that they were used for the purpose of extending and broadening the exception made in the statute.

¹⁴ *Pullis Bros. I. Co. v. Boemler* (1901) 91 Mo. App. 85.

¹⁵ *Palmer v. Van Santvoord* (1897) 153 N.Y. 612. The court said: "If the legislature intended, by the Act of 1885, to prefer all debts owing

superintendent or manager of a corporation is not entitled to a preference". Such a functionary is regarded as being substantially an officer"; or, as it is expressed in another case, he is the representative of the corporation in respect to the conduct of its business". Nor do these words include an agent for the sale of goods in a foreign country, on a salary and commissions". There is, however, a conflict of opinion concerning the scope of the expression with relation to the lower grades of corporate servants.

One view is that it "includes persons employed by a corporation in comparatively subordinate positions who cannot correctly be described either as operatives or labourers; such for example as bookkeepers, clerks, salesmen and agents engaged at a regular compensation in soliciting orders for goods"*. This statement summarizes the effect of some of the earlier decisions". The essence of that doctrine is that the term

by a corporation (other than an insurance or moneyed corporation), of which a receiver should be appointed, to 'employés,' using the word in its largest sense, the words 'operatives and labourers' with which it is associated are superfluous. The use of these associated words indicates that the word 'employés,' by which they are preceded, was used in a restricted and limited sense."

* *People v. Remington* (1887) 45 Hun. 329, Aff'd. 109 N.Y. 631 (memo.); *Re Stryker* (1899) 158 N.Y. 526, Aff'g. 73 Hun. 737.

"Andrews, C.J., in *Palmer v. Santvoord* (1897) 153 N.Y. 612, referring to the first of the cases cited in the preceding note.

"*Re American Lace & Fancy Paper Works* (1898) 30 App. Div. 321.

"*People v. Remington* (1857) 45 Hun. 329. Aff'd. 109 N.Y. 631 (memo.).

"*Re American Lace & Fancy Paper Works* (1898) 30 App. Div. 321.

"In *Brown v. A.B.C. Fence Co.* (1889) 52 Hun. 151, it was held that a man employed to assist the general manager in keeping the books of the company, and to clean the office and show room, and assist in putting together, taking apart, and shipping the manufactured products was entitled to the preference. The language used in the opinion shows that, even if the duties of the claimant had been confined to those of a bookkeeper, he would still have been treated as being within the protection of the statute.

In a later decision by the same court, the right of a bookkeeper to a preference was explicitly affirmed. *People v. Bevedge Brewing Co.* (1895) 91 Hun. 313. The court disapproved *Re Stryker*, 73 Hun. 327, which was afterwards affirmed by the Ct. of Appeals in 158 N.Y. 526. See *infra*.

The position taken in these cases was indorsed by the Court of Appeals

"employés" although it takes its colour from the other expressions with which it is grouped, should be regarded as bearing a distinct and independent significance which serves to extend the scope of the statute beyond the limits imported by those expressions.

In its latest decision on the subject, however, the Court of Appeal has definitely committed itself to the view that the statute is not intended "to secure a preference for claims due to the clerical force engaged in transacting the business of a company, nor to its superintendent, firemen, or any officers of the corporation who are compensated by a fixed yearly salary"²².

in *Palmer v. Van Santvoord* (1897) 153 N.Y. 612. The effect of the decision was that a preference should be allowed to an employé hired to sell the machines of his employers, and to go from place to place and set them up for the purchasers. As stated in *Re Stryker*, (see next note), the work which this claimant performed was so largely manual that he might without impropriety have been classed among "labourers" and "mechanics." But the actual standpoint of the court is indicated not merely by its remark, made *arguendo*, to the effect that "a bookkeeper or person employed to make sales of merchandise or property is entitled to a preference," but also the general course of its reasoning, which distinctly shows that it regarded the expression "employés" as being intended to cover a class of servants engaged in the performance of work different from, and higher than that implied by the terms "operatives" and "labourers." The following passage may be quoted: "The word 'employés' in the statute of 1885 is a word of larger import than the words 'operatives and labourers' which follow it, (*Gurney v. Atlantic G.R. Co.*, 58 N.Y. 358); and, while it may embrace the latter classes it is not confined to those who perform manual labour only; and to construe in the narrowest sense as embracing those classes only, would violate one of the accepted canons of construction to which we have referred,—that each word used in an enumeration in a statute of several classes or things, is presumed to have been used to express a distinct and different idea. . . . "It is doubtless true that, from the lack of technical accuracy and precision in the framing of statutes, a word of large import is often followed by words of narrower meaning, expressing what is included in the larger term, but this does not justify a restriction of the scope and meaning of the larger term to what is expressed in the words which follow, unless the context points to such a construction."

The two cases last cited were relied on in *Re Smith* (Sup. Ct. 1899) 59 N.Y. Supp. 799, as authorities for granting a preference to a commercial traveller who sold goods in a particular territory, selected by the employer, and whose remuneration consisted exclusively of commissions.

In *Re Fitzgerald*, 21 Misc. 226, a travelling salesman was held to be entitled to a preference. This decision, like those above mentioned, is in effect overruled by *Re Stryker*.

The same remark is applicable to a decision by which a preference was allowed to a salesman in a store. *Re Luxton & D. Co.* (1898) 35 App. Div. 243.

²² *Re Stryker* (1899) 158 N.Y. 526. The employés whose claims were rejected in this case were a clerk and bookkeeper, the superintendent, the

The present writer has no hesitation in saying that, in his opinion, the broader view at first taken by the court is the correct one. Under the doctrine finally adopted the group of expressions used by the legislature becomes tautological to an almost inconceivable degree.

(g) "*Employé, labourer, or other person who may aid by his labour, etc.*" These words as used in the section, (1360), of the Mississippi Code regarding liens on crops, have been held to embrace the overseer of a farm. The *ratio decidendi* was that

shop foreman, and the draughtsmen of a manufacturing company. The court reasoned thus: "The most important word in the statute is the word 'wages.' It was wages that the legislature intended to prefer in the distribution of the assets of the insolvent corporation, not salaries, nor earnings, nor compensation. It was not intended to prefer the claims of all employés, but it was manifestly intended to limit the preference to the particular class whose claims would be properly expressed by the use of the word wages. This word is applied in common parlance specifically to the payment made for manual labour, or other labour of menial or mechanical kind, as distinguished from salary and from fee, which denotes compensation paid to professional men. (Century Dictionary.) In its application to labourers and employés it conveys the idea of subordinate occupation which is not very remunerative, of not much independent responsibility, but rather subject to immediate supervision. This was the construction which this court placed upon the statute in the case of *People v. Remington* (see *supra*). . . . "Although the word employés is used, yet the purpose of the statute was to protect mechanics, operatives or labourers from loss of their wages in the event of the insolvency of the corporation. It is significant to note that insurance and moneyed corporations are excepted from the operation of the statute. There was no reason for excepting these corporations but for the fact, well known, that they do not employ labour, in the ordinary sense of that word. The conduct of the business of these corporations requires a large clerical force, graded and organized according to the extent and necessities of the business. If it was intended to protect the claims of this class of employés, there was no reason why all corporations should not be included within the scope of the statute. But it evidently was not. It was supposed that that class of employés could protect themselves, whereas the common labourer, operative or mechanic would be left by the failure of the business in a much more helpless condition. The wages of labourers, mechanics and domestic servants has in modern times become the subject of protective legislation in this and many other countries, and whenever the law has been extended beyond these classes, so as to include the claims of parties performing clerical duties or work of a like character, it was by judicial construction based upon language much broader than is to be found in the enactment in question." The court stated that the views thus expressed were not in conflict with the case of *Palmer v. Van Santvoord*, *supra*. This assertion was justifiable if only the facts of that case are adverted to. (See last note.) But it seems to be scarcely possible to escape the conclusion that the two cases reflect essentially different conceptions regarding the scope of the term, "employés." In *Cochran v. Baker* (Supp. Ct. 1899) 30 Misc. 48, 61 N.Y. Supp. 724, the opinion was expressed that the later decision had overruled the earlier.

the insertion of the word "employé" in the previous enactments, in *pari materia*, and the broadening of the language in other respects justified the inference that the alterations were made for the purpose of enlarging, *quoad personas*, the scope of the lien².

8. — of words, single or grouped, not importing manual work.—

(a) *Employés*. In its most extended signification this term is applicable to any person employed by another. In statutes of the type under discussion it is invariably associated with other expressions which serve to show more or less precisely the meaning which the legislature intended to attach to it. But there is some authority for the doctrine that, even if it were used alone, it should not be construed as including a person occupying so high a position as that of manager or superintendent of an entire concern³. Such a doctrine, however, can scarcely be regarded as beyond discussion in all the American States. It is directly opposed to the views of the English courts with respect to the scope of the term "servant," as used in the Bankruptcy Acts⁴.

The meaning of the term employé is sometimes restricted by the words of the title of the statute in which it occurs. Thus it has been held that, when used in the body of an Act of which the purpose is to provide "labourers'" liens for wages, it should be regarded as being equivalent to "labourers," and therefore not applicable to the superintendent of a mining company⁵.

(b) "*Clerks*." This expression has been held not to be ap-

² *Wiese v. Rutland* (1894) 71 Miss. 933.

³ In *Pullis Bros. Iron Co. v. Boemler* (1901) 91 Mo. App. 85, the court expressed the opinion, *arguendo*, that by popular use of the term is confined to "clerks or labourers who work for a salary or wages."

Reference may also be made to a case in which it was held that the secretary of a railroad company is not a "servant" or "employé" within a foreclosure decree directing the payment of sums due to "any servant or employé." *Wells v. Southern Min. R. Co.* (1880) 1 Fed. 270. The *ratio decidendi* was that the secretary is an "officer."

⁴ See § 2, note 5, *ante*.

⁵ *Malcomson v. Wapoo* (1898) 86 Fed. 192.

plicable to a general manager⁴; nor to a man engaged in soliciting orders for and selling the products of a mine upon commission⁵.

(c) "*Clerks, servants and employés.*" An insurance adjuster who received an annual salary and his expenses, but did not devote his whole time and services to his employers, was held not to be entitled to a preference under a statute containing the combination of words⁶.

(d) "*Bookkeepers, clerks, agents, reporters, and other employés.*" In the only State where this combination of words

⁴ *The Short Cut* (1887) 6 Fed. 630 (construing the special Pennsylvania Act of April 20, 1858, as to boats navigating certain rivers).

⁵ *Willauer's Estate* (1882) 1 Chest. Co. Rep. 533.

⁶ *Boston & A.R. Co. v. Mercantile T. & D. Co.* (1896) 82 Md. 535, 38 L.R.A. 97. Referring to the functions of the claimant the court observed: "It was his duty and the duty of other adjusters when an accident occurred to ascertain all the facts and circumstances in connection with such accident—how it happened, whether it was through the fault of the insured corporation, the nature and extent of the injury, and to make report thereof to the company. All this involved the exercise of judgment and discretion and required some familiarity with the principles of law relating to the legal liability of the insured. Now, it is clear, we think, that the word "employé" as used in the statute was intended to have a limited meaning, and that it cannot be applied in its broadest sense, or as including every one in the service or employment of a corporation or individual. The object of the statute was to provide for the payment of the wages and salaries due a certain class of persons to whom such wages or salaries were deemed always necessary for their support and maintenance. The statute first provides for the payment of the wages and salaries of clerks, persons rendering mere clerical services, then, of servants or employés. The statute did not mean by employés persons rendering services of a higher degree than clerks. The duties of an adjuster being, as far as we are able to discover, of the character we have described, these officers, whilst in a general sense employés, cannot by any fair rule of construction be considered employés in the limited and restricted meaning of that term as used in the statute. To hold otherwise would result in the inclusion of a large class of persons in the service of a company or individual as preferred creditors though they are obviously not within the scope, purpose and object of the Code, under which provision is made for a preference." The court undertook to distinguish this decision from that rendered in *Moore v. Heaney* (1859) 14 Md. 558, by pointing out that, in the earlier case a wide and liberal meaning was given the word "employés," so as to bring as large a class of persons as possible within the range of an exemption granted of labourers and other employés from the stringent terms of the attachment law, and from the equally harsh effects of attachment levied by way of execution on wages. The explanation seems to show that the *rationale* of the decision as to the adjuster was that, in the view of the court, statutes granting preferences to the wages of employés are to be construed strictly a doctrine which is certainly opposed to the weight of authority.

has been used by the legislature, it has been held that they include an employé who used his own team to haul logs for a sawmill, at a stated sum per diem'. No general principle, however, was invoked by the court.

9. Persons entitled to privileges under statutory provisions in Civil Law Jurisdictions. Louisiana.—(a) *Scope of provisions as determined by the reasons for allowing the preference.* In one case it was observed that "most of the claims mentioned in Art. 3158 [3191] of the Code, are a class which the lawyer has thought proper to favour from considerations of humanity and public order. 'Servants' and 'clerks' are a class of persons who are usually dependent for their support upon their 'wages or salaries'".¹

(b) *Rule of construction applied in determining the scope of these provisions.* It has been laid down that privileges are *stricti juris*, and only to be allowed in cases expressly provided for by law'.²

(c) *Meaning attached to specific terms.* The description "clerks, secretaries, and persons of that kind," in Art. 3191, [3158] of the Code, has been held not to embrace editors, reporters, carriers, printers, and compositors of a newspaper'; nor a foreman in a job printing office'; nor an agent, employed on a monthly salary and commissions to solicit sales of the goods of his employer's manufactory'; nor a person engaged in selling goods under a contract that he shall receive half the profits and bear half the losses of the business'; nor a teacher in a school kept by the insolvent'.

By the express terms of Art. 3205 [3172] of the Code, the

¹ *First Nat. Bank v. Kirby* (Fla. 1901), 32 So. 881.

² *Guion v. Brown* (1851) 6 La. Ann. 112.

³ *Guion v. Brown* (1851) 6 La. Ann. 112.

⁴ *Stephens v. Sawyer* (1848) 3 La. Ann. 428.

⁵ *Lewis v. Patterson* (1868) 20 La. Ann. 294.

⁶ *Weems v. Delta N. Co.* (1881) 33 La. Ann. 973.

⁷ *Brierre v. Their Creditors* (1891) La. Ann. , 9 So. 640.

⁸ *Labato's Case* (1852) 2 Mart. N.S. 652.

“servants” who are accorded a privilege by Art. 3191 [3158], are defined as “those who receive wages, and stay in the house of the person paying and employing them for his service or that of his family; such are valets, footmen, cooks, butlers, and others who reside in the house.” Accordingly a tailor’s foreman has no privilege under this provision¹.

It has been held that a person who superintends the construction of a building is within a statute which gives a lien to “every mechanic, workman or other person doing or performing any work towards the erection of a building”².

10. — Quebec.—(a) *Footing on which the provisions in this province are construed.* It is held as in Louisiana that privileges are *stricti juris*³.

(b) *Meaning attached to specific terms.* In one case the court applying the rule of strict construction held that a commercial traveller was not a “clerk” within the meaning of Art. 2006 of the Code. It was considered that the phraseology of this provision showed that it was intended only for the benefit of employés whose services were required in the “store, shop, or workshop” which contained the “merchandise” subjected to the privilege⁴. In a later case the court of first instance proceeded upon the ground that the general term “*commis*,” which in the English version of the Code is translated by the word “clerk,” might fairly be regarded as including “*commis-voyageur*.” The consideration adduced for the purpose of justifying this construction was that the older French Law regarded

¹ *Lauran v. Hotz* (1823) 1 Mart. (La.) N.S. 140. The court took the position that the word “servant” is used in the same restricted sense as the phrase “*gens de service*” in the French law, and includes only “domestic servants.” *Pandectes Françaises*, vol. 15, 102; Pothier, *Traité des hypothèques*, ed. 1809, app. p. 448. Reference was also made to the similar doctrine of the Spanish law.

² *Mulligan v. Mulligan* (1866) 18 La. Ann. 20. This decision is in line with those cited in § 5, note 9. But there seems to be some difficulty in reconciling it with the principle that “privileges” are *stricti juris*.

³ *Ross v. Fortin* (1881) 8 Quebec L.R. 15, 11 Rev. Leg. 337.

⁴ *Ross v. Fortin* (1881) 8 Quebec L.R. 15, 11 Rev. Leg. 337.

the privilege with favour'. The appellate court expressed a doubt as to the correctness of the view, but did not definitely determine the question'. The modern French doctrine is that such an employé has no privilege'. But that doctrine has relation to the scope, not of the term "*commis*," but of the phrase "*gens de service*," as used in Art. 2101 of the Code Napoleon.

The French authorities are divided upon the question whether that phrase embraces such employés as the professors attached to an educational institution, secretaries, librarians, etc."

A man employed from day to day has no privilege under Art. 2006 of the Code'.

11. *Employés within the purview of statutes imposing a personal liability upon stockholders.*—(a) *Scope of these statutes as determined by the reasons for enacting them.* The motive by which the legislatures have been influenced in imposing the special liability created by these statutes is, broadly speaking, the same as that which has led to the enactment of the laws discussed in the preceding sections, viz., "to throw a special protection around that class of persons who actually perform the manual labour of the company"¹ The consideration which has influenced the legislatures in affording them this protection is that they are "not well qualified to protect themselves,—men who usually labour for small compensation, and who are regarded, to a certain extent, as in the power of their employers—men who usually take no security for their services, who would generally

¹ *Harris v. Haneyman* (1885) Montr. L.R. 1 S.C. 191, 8 Leg. News 102.

² *Haneyman v. Harris* (1886) Montr. L.R. 2 Q.B. 466.

³ See Beauchamp's Quebec Civ. Code Ann., notes to Art. 2006.

⁴ See Beauchamp's Quebec Civ. Code Ann., notes to Art. 2006.

⁵ *Van Alstyne v. Gray* (Super. Ct. 1879) 2 Leg. News, 302. The French commentators on Art. 2101 of the Code Napoleon are divided upon the question whether such a servant has a privilege, the preponderance of authority being against according him priority. See Beauchamp's Quebec Civ. Code Ann., notes to Art. 2006. The same writers are upon the whole in favour of the view that an engagement for a year is not a necessary condition of the privilege. *Ibid.*

⁶ *Coffin v. Reynolds* (1868) 37 N.Y. 640.

be dismissed for requiring it, and therefore never make the attempt''².

(b) *Rule of construction applied in determining the scope of these statutes.* In one State it has been held that these statutes should be liberally construed in favour of employes³. But the view sustained by the preponderance of authority is that they should receive a strict construction, for the reason that, although remedial in character, they are in derogation of the common law, and impose new liabilities⁴; or as it is expressed in one case, because they are penal in their nature⁵.

12. *Same subject. Construction of specific words and phrases.*— (a) "*Labourers.*" As employed in statutes of the description now under consideration, this word, whether it be used alone, or in combination with other descriptive terms, may be said, broadly speaking, to carry the same significance as when it occurs in enactments which create liens and preferences. That is to say it is applicable to "a class of servants who obtain their living by coarse manual labour"⁶. It does not include employes who

² *Ericsson v. Brown* (1862) 38 Barb. 390. Compare the remarks in *Coffin v. Reynolds*, *supra*, that the purpose of the Act was "to furnish additional relief to a class who usually labour for small compensation, to whom the moderate pittance of their wages is an object of interest and necessity, and who are poorly qualified to take care of their own concerns, or look sharply after their employers."

"The obvious intent and policy of this and other similar Acts is to make provision for those who are the workmen on (i.e. of a railway company) the road, who are usually persons of small pecuniary means, not able to lose their daily earnings. *Bontwell v. Townsend* (1860) 37 Barb. 205.

³ *Day v. Vinson* (1890) 78 Wis. 198, 47 N.W. 269, 10 L.R.A. 205. *Clokus v. Hollister Min. Co.* (1896) 92 Wis. 325, 66 N.W. 398.

⁴ *Appeal of Black* (1890) 83 Mich. 513, 47 N.W. 342. The court also laid stress upon the consideration that, as regards their liability for corporate debts, the stockholder stood in the relation of sureties to the company, and that sureties are only liable according to the strict terms of their undertaking.

For other case affirming the doctrine of strict construction, see *Palmer v. Vantvoord* (1897) 153 N.Y. 612 (*arguendo*, p. 618); *Moyer v. Pennsylvania Slate Co.* (1872) 71 Pa. 293; *Cocking v. Ward* (Tenn. Court Chancery Appeals) (1898) 48 S.W. 287; *Cole v. Hand* (1890) 7 L.R.A. 96, 88 Tenn. 400, 12 S.W. 922.

⁵ *Bristor v. Smith* (1899) 158 N.Y. 157, 53 N.E. 42.

⁶ *Ericsson v. Brown* (1862) 38 Barb. 390.

hold positions of such a nature that the manual labour which they are required to perform in the course of their duties is an incident rather than the principal part of the service'. In other words the occasional performance of manual labour by an employé who, apart from that circumstance, would not be considered as a "labourer" does entitle him to the benefit of the statute'. In this point of view it is not applicable to an assistant chief engineer of a railroad company'; nor to a travelling salesman'; nor to the secretary and bookkeeper of a manufacturing corporation'.

(b) *Labourers and operatives*. In a case cited in the preceding subdivision the court expressed the opinion that the word "operative" though of nearly the same signification as the word "labourer," has a somewhat more comprehensive scope. But this conception regarding the connotation of the two words seems to be wanting in accuracy. The more correct doctrine, it is submitted, is to consider the word "labourer" as being the appropriate description of an unskilled workman, and the word "operative" as being designative of a skilled workman or artisan'. But in any event it is obvious that neither word can

* See case cited in last note.

* *Dean v. De Wolf* (1878) 16 Hun. 186.

* *Brockway v. Innes* (1878) 39 Mich. 47, 33 Am. Rep. 348 (decided on the ground that the work was "mostly direction and scientific work, involving much more superintendence than personal exertion in manual labour.")

In this connection reference may be made to a case in which it was held that a member of an engineering corps is not within an Act appropriating money to pay "labourers" of a railroad company. *State v. Rusk* (1882) 55 Wis. 465.

* *Jones v. Avery* (1883) 50 Mich. 326. In that case the court observed that the claimant "had no part in carrying the establishment, nor in manufacture. He was a mere outside agent or representative of the company, to bring business to it; upon a salary. As regards the present question, his position was nearer the position of an officer of the corporation than that of a labourer."

* *Viele v. Wells* (1881) 9 Abb. (N.Y.) N. Cas. 277, a case in which the claimant had performed services in New York for a Michigan corporation. It was held that the term "labour" should be construed in accordance with the law of Michigan, that the judgment contemplated by the Act was a judgment of a Michigan court, and that under the law of neither state were plaintiff's services embraced within its meaning.

' See the Dictionaries, *sub voc.*

be construed as including the services of a professional man, such as a consulting engineer of a steamship company^{*}.

(c) "*Labourers and servants.*" These words, which are used in the New York Railroad Act, have been declared to be applicable to "all persons employed in the service of the company who have not a different, proper, and distinctive appellation, such as *officers* and *agents* of the company. The engineer, the master mechanic, the conductor, is as fully entitled to its benefit as is the man who shovels gravel. The latter is, in law, no more and no less a '*servant*' of the company than either one of the former"^{*}. In the case cited a civil engineer was held to be within the statute,—a ruling which, if it is to be regarded as being still good law, indicates that this enactment is not so restricted in its operation as the one considered in the following subsection. But having regard to the general trend of the more recent decisions in New York—not merely those which relate to the personal liability of stock-holders, but those which involve the extent of preferences and other special remedial rights affecting the recovery of wage,—(see § 5, ante), it is permissible to feel some doubt whether so wide a scope as is indicated by the passage quoted above would at the present time be attributed to the words in question.

(d) "*Labourers, servants, and apprentices.*" These descriptive words were used in § 18 of N. Y. Laws, 1848, ch. 40. That Act is now superseded by § 54 of the Stock Corporation Law of 1892, in which the privileged classes of claimants are designated as "labourers, servants, or employés other than contractors." But the alteration thus made is clearly unimportant, so far as the questions with which we are here under discussion are concerned, and as a matter of fact, the cases decided with reference to the original statute are still cited as controlling authorities¹⁰. The footing upon which that statute was construed by the Court

^{*} *Ericsson v. Brown* (1862) 38 Barb. 390, construing the special Act of April 11, 1849, § 10.

^{*} *Conant v. Van Schaick* (1857) 24 Barb. 87.

¹⁰ See *Bristor v. Smith* (1899) 158 N.Y. 157.

of Appeal is indicated by the following extract from the opinion in a leading case: "In common parlance, it [*i.e.*, the term "servant"] is understood to relate and apply only to a person rendering service of a subordinate, but not necessarily of a menial, character to an employer, varying in its nature, according to the business or occupation in which it is rendered, and not to extend to and include every employé or party who does work for another. The context in which it is used, in the section referred to, being associated with 'labourers' and 'apprentices,' indicates that it was intended to apply to a person employed to devote his time, and render his service in the performance of work, similar in its general character to that done by those employés"¹¹. The doctrinal standpoint thus adopted is suggestive of two *criteria* with reference to which the right of an employé to avail himself of the statutory remedy may, according to circumstances, be considered.

One of those *criteria* is indicated by the statement that the employés for whose protection the enactment is designed are "those engaged in manual labour, as distinguished from officers of the corporation, or professional men engaged in its service"¹².

¹¹*Hill v. Spencer* (1874) 61 N.Y. 274.

In a later case it was observed: "To the language of the Act must be applied the rule common in the construction of statutes, that when two or more words of analogous meaning are coupled together, they are understood to be used in their cognate sense, express the same relations, and give colour and expression to each other. Therefore, although the word 'servant' is general, it must be limited by the more specific ones, 'labourer and apprentice' with which it is associated, and be held to comprehend only persons performing the same kind of service that is due from the others. It would violate this rule to hold that the intermediate, or second class, represented a higher grade than the class first named."

¹²*Bacon, J.*, in *Coffin v. Reynolds* (1868) 37 N.Y. 640. Grover, J., observed that "the design of the statute was to afford protection to a class of employés of the company known as labourers, servants and apprentices, and not as officers and agents of the company. It was deemed proper by the legislature to leave the latter class to their remedy against the company only. Section five of the Act provides for the appointment of a president and subordinate officers of the company. Had the statute designed to include these officers it would have used terms embracing them, but they are in the last section called officers and not servants of the company. Again, the officers of the company are not within the same reason for special protection as the labourers. The latter are occupied with their labour, and have no means of knowing any thing of the pecuniary condition of the company, while the former are usually better acquainted with that than the gen-

On this ground it has been held that the personal liability of stockholders cannot be enforced by the secretary of a company"; nor by an employé entrusted by a mining company with full power to control its property and manage its financial affairs in a foreign country"; nor by a person employed to take the

eral creditors." Bacon, J., in his opinion referred with approval to the remark of Selden, J., in an earlier case: "In some extended sense, the directors and other principal officers of the corporation may be considered as its agents and servants; and yet no one would contend that the provision was intended for their benefit. The word 'servants' is qualified, and, to some extent, limited by its association with the word 'labourers,' according to the familiar maxim, *noscitur a sociis*."

See also the passage quoted in the following notes.

The limiting words in the text which exclude professional men from the purview of the statute would seem to have destroyed the authority of a case in which it was held that a man who was employed by a manufacturing corporation as its civil engineer and travelling agent, at an annual salary, and who, in the performance of his duties, was bound to follow the directions of the company, was a "servant." *Williamson v. Wadsworth* (1867) 49 Barb. 294. (not specifically mentioned in *Coffin v. Reynolds*).

Having regard to that limitation, it seems to be also impossible to accept as correct a decision of later date than *Coffin v. Reynolds*, in which it was held that a newspaper reporter and city editor, if he is not an officer of the employing company, is a "servant." *Harris v. Norvell* (Sup. Ct. Special Term 1876) 1 Abb. N.C. 127. The theory thus adopted, that all employés who are not officers are servants, is manifestly inconsistent with the language used by the Court of Appeals.

In a still later case it was held that a bookkeeper, *not an officer* of the corporation, and not charged with any *duty of superintendence*, nor with any other duties than such as usually pertain to the position, is a "servant." *Chapman v. Chumar* (1889) 54 Hun. 636, 7 N.Y. Supp. 230.

But the more extended assumption upon which the court here proceeded, viz., that the word "servant" included all employés who were neither officers nor persons exercising supervisory powers, ignores that part of the statement in the text which treats professional men as being outside the purview of the Act. That such men may be working under circumstances which place them outside the two classes of employés thus excluded, is manifest. It is no doubt questionable whether a bookkeeper can be said to be a "professional man" as that phrase is understood. But if this description is not applicable to him in such a sense as to bring him within the operation of the rule laid down by the Court of Appeals in *Coffin v. Reynolds*, *supra*, it seems clear that the more general doctrine stated by that court in the passage quoted at the beginning of this subsection, should have been deemed fatal to the enforceability of the claim of such an employé.

²² *Coffin v. Reynolds* (1868) 37 N.Y. 640, overruling the decision to the contrary effect in *Richardson v. Abendroth* (1864) 43 Barb. 162.

²⁴ *Hill v. Spencer* (1874) 61 N.Y. 274. Rev'g. 2 Jones & S. 304. The court accepted, as a correct proposition, the statement of plaintiff's counsel, that the word "servants" must be taken to have been used "not in its broadest, most comprehensive, nor in its most limited and restricted sense, but according to the general and ordinary use of the term." The court also conceded that "to use it in its most comprehensive sense would include the president and other officers of a corporation; while its use in

place of the superintendent of a mine in a foreign country during his temporary absence"; nor by a person employed as book-keeper and general manager"; nor by an attorney employed to attend to the legal affairs of a company".

a limited and restricted sense would only indicate a domestic, a person employed in the house or family, or a menial who labours in some low employment; and that the term was not intended to extend to the former, nor to be limited or restricted to the latter class." It was also admitted that counsel had correctly asserted that, "unless it be when domestic or menial servants are referred to, there is no sense or use in which the word 'servant,' by its own force, indicates a mere bodily or manual service." But it was pointed out that this circumstance failed to show, that the plaintiff's services were those of a servant, "according to the general and ordinary use of the term,"—the sense for which the claimant's counsel had himself contended.

This decision was followed with respect to an employé holding a similar position, in *Krauser v. Ruckel* (1879) 17 Hun. (N.Y.) 463.

"*Dean v. De Wolf* (1878) 16 Hun. (N.Y.) 186, Aff'd, 82 N.Y. 626 (memo.). The court treated *Hill v. Spencer*, *supra*, as a controlling authority, and refused to allow any differentiating import to be attached to the circumstance that the claimant had sometimes performed manual labour in the course of the performance of his duties.

"*Wakefield v. Fargo* (1882) 90 N.Y. 213. The court said: "It is plain we think, that the services referred to are menial or manual services—that he who performs them must be of a class whose members usually look to the reward of a day's labour, or service, for immediate or present support, from whom the company does not expect credit, and to whom its future ability to pay is of no consequence; one who is responsible for no independent action, but who does a day's work, or a stated job under the direction of a superior. . . . A general manager is not *ejusdem generis* with an apprentice or labourer; and although in one sense he may render most valuable services to the corporation, he would not in popular language be deemed a servant."

In *Kincaid v. Dwinelle* (1875) 59 N.Y. 548, the sole question directly discussed was whether the claimant, the superintendent of a manufacturing company, had fulfilled the requirements of procedure which would entitle him to recover under the statute. For the purposes of its argument the court seems to have assumed that such an employé was within the purview of the statute. This position, if the language used is to be regarded as importing the adoption of it, is manifestly inconsistent with the cases cited in this and the preceding notes.

"*Bristor v. Smith* (1899) 158 N.Y. 157, 53 N.E. 42, Aff'g. 29 App. Div. 624, 52 N.Y. Supp. 1138, which aff'd. 22 Misc. 55, 49 N.Y. Supp. 404. The court said: "To the ordinary reader of the language of this statutory provision (the amended Act) I doubt that it would ever occur that the word 'employés' had any wider significance than to define, in a general way, such classes of persons as were engaged in serving the corporation in subordinate capacities; but, when we apply the rules of construction to the case, any other definition of the word becomes unreasonable, if not impossible, than that it means persons sustaining such relations to the corporation as do labourers and servants. The statute was a continuation of previous legislation, which had for its object the protection of those who earned their living by manual labour, and not by professional

Another criterion is furnished by the language which has been used in contrasting the positions of supervising and subordinate employés. "‘Labourer’ or ‘apprentice’ are words of limited meaning, and refer to a particular class of persons employed for a defined and low grade of service performed as before suggested without responsibility for the acts of others, themselves directed to the accomplishment of an appointed task under the supervision of another. They necessarily exclude persons of higher dignity, and require that one who seeks his pay as servant, should be of no higher grade, than those enumerated as labourers or of lesser quality. A statute which treats of persons of an inferior rank cannot by any general word be so extended as to embrace a superior; the class first mentioned is to be taken as the most comprehensive ‘*specialia generalibus derogant*’"². The particular decision by which, in the case cited, a general manager was excluded from the purview of the enactment may be referred to the consideration that he was an "officer" of the company within the meaning of the statement already adverted to. But

services, and who were supposed to be the least able to protect themselves. To such persons, and to all who become employed in subordinate and humble capacities and to whom the hardship would be great, if their wages or salaries were not promptly paid, the legislative policy is to afford the protection of a recourse to the stockholders of a company, upon the latter's default. . . . When, in section 54 of the Stock Corporation Law, the general word 'employés' was added after the words 'labourers' and 'servants,' it could not have been intended, from the collocation of words and for the want of reason in the thing, to include persons performing services to the corporation of a higher dignity, such as its legal adviser. Indeed, the appellant would be utterly without any reason in claiming the protection of the statute, if he could not pretend that his agreement with the company made him its employé. But the only effect of that agreement, so far as it bore upon their relations, was to secure to each permanency in the relation of attorney and client and certainty as to the measure of compensation. The lawyer does not lessen the dignity and independence of his position towards his client, or in the community, by making such an agreement. He does not, thereby, descend into that inferior and subordinate class of persons who, being continuously employed in the corporate business for a compensation paid in wages, or in salaries, and being under the orders of the managers of the corporation, are usually regarded as its servants or employés."

The above case was followed in *Hallett v. Metropolitan Messenger Co.* (1901) 72 N.Y.S. 370, 35 Misc. Rep. 659; judgment modified (1902) 74 N.Y.S. 639, 69 App. Div. 258.

² *Wakefield v. Fargo* (1882) 90 N.Y. 213.

the unqualified nature of the phraseology by which supervising employés are placed in a class by themselves would seem to indicate that, in the view of the court, the lower as well as the higher grades of such employés are outside the scope of the enactment. How far the current of authority may ultimately run in this direction remains to be seen. All that need be observed in this place is that some decisions of the inferior courts of New York can scarcely be treated as correct, unless it is assumed that the broad differentiation which is propounded in the passage just quoted between employés who do, and employés who do not, exercise control, is subject to some limitations".

(e) *Labourers, servants, apprentices, and employés.* The word "employés," as used in this connection in the Indiana statute has been held not to be applicable to a corporation aggregate".

(f) "*Labourers, servants, or clerks.*" Neither the superintendent of a mining company"; nor the manager of a hotel company", are entitled to the benefit of a provision containing this combination of descriptive terms.

¹⁹ In the opinion delivered in *Wakefield v. Fargo*, *supra*, it was intimated that the ruling in *Hovey v. Ten Broeck* (1865) 26 N.Y. Super. Ct. (3 Rob.) 316; to the effect that an employé who supervised the other servants managed his master's property, and kept the books of the establishment, but also performed manual labour in company with his subordinates was incorrect, in so far as it treated him as being within the statute in respect to his functions as a superintendent.

This criticism is also applicable to another case (not specifically referred to in *Wakefield v. Fargo*) in which a sort of engineer, or foreman in a mine, who showed the men how to work and worked with them, took the place of the superintendent when he was absent, and sometimes kept the time of the men, was a "servant" within the statute. *Vincent v. Bamford* (1871) 42 How. Pr. 109, 12 Abb. Pr. (N.S.) 252; and also to a case in which it was held that the statute covered a employé who acted as foreman, helped to manufacture stone, kept the time of the hands, solicited orders, and did whatever told to do by the superintendent. *Short v. Medberry* (1883) 29 Hun. (N.Y.) 39. (No reference was made to *Wakefield v. Fargo* which had been decided in the preceding year.)

²⁰ *Dukes v. Love* (1884) 97 Ind. 341 (Ind. Rev. Stat. 1881, § 3869, Burns Rev. Stat. (1894) and (1901), § 5077), applying the rule of construction, *Noscitur a sociis*.

²¹ *Cocking v. Ward* (Ch. App. 1898) [Aff'd. by Sup. Ct.] 48 S.W. 287.

²² *Wilson v. Patton*, (Tenn. 1894) MSS. Opinion (Tenn.), referred to in *Cocking v. Ward*.

(g) "*Labourers, servants, clerks, and operatives.*" A provision which contains this combination of words has been held to apply to the services of a salaried employé whose time was spent partly in discharging the duties of a travelling salesman and collector, and partly in shipping and receiving goods, moving and handling stock, etc., in his employer's store, or making sales and collecting bills in the city where that store was situated².

(h) "*Clerks, servants, and labourers.*" It has been held that a superintendent of a mining company, although he does not perform any manual labour, is within the purview of a statute in which these expressions are employed. The *ratio decidendi* was that the use of the word "clerk" showed that "it was intended to secure the benefits of the act to servants and labourers who are not usually termed either menial servants or manual labourers in the ordinary sense of those terms".

13. *Employés within the purview of statutes which render directors of companies personally liable for wages.*—In the Ontario statute to this effect the expressions used are "labourers, servants, and apprentices." This group of words has received a construction virtually the same as that which has been ascribed to it by the New York Court of Appeals. See preceding section, subd. (d). It has been declared not to be applicable to a person holding the position of a foreman who dismissed employés, made out pay-rolls, receives and paid out moneys for wages, performed no manual labour, and received wages fortnightly for his own services, with additional compensation for the use of machinery and horses³.

² *Cole v. Hand* (1890) 88 Tenn. 400, 7 L.R.A. 88, 12 S.W. 922 (Tenn. Gen. Incorpor. Act, 1875, § 11).

³ *Sleeper v. Goodwin* (1887) 67 Wis. 577. The court distinguished *Wakefield v. Fargo* (1882) 90 N.Y. 213, subd. (d), *supra*, note 16, on the ground that a wider scope was given to the Wisconsin statute by the inclusion of the word "clerks" in place of the expression "apprentices" which is found in the New York enactment.

¹ *Welch v. Ellis* (1895) 22 Ont. App. 255. Osler, J.A., said: "The object [of the Act] evidently was to protect, not the officers and agents,

14. — of statutes imposing upon principal employers liabilities for the wages of persons performing labour for contractors.— (a) *Footing upon which these statutes are construed.* It has been laid down that statutes of this description, although they are remedial, must be strictly construed as being in derogation of the common law, and imposing new burdens upon the persons subjected to liability¹.

(b) *Employés entitled to sue as "labourers."* In all the American statutes the class of employés for whose benefit they are enacted are designated by the use of the word "labourer" or "labour." So far as appears from the very few decisions which bear upon the point, they are not regarded as being applicable to any persons except those who work with their hands. They do not include such employés as a man employed as time-keeper and superintendent², or a superintendent of bridge-building³.

(c) — as "*workmen.*" The scope of this term, as used in the statutes which have been enacted in some of the British Colonies appears to be wider than that of the word "labourer," in the American enactments⁴.

and servants of a superior class but the inferior, and less important class. . . . Taking 'labourer' on one side, and apprentice on the other, we are driven to conclude that word 'servant' was not intended to include the higher grades of employment, but is controlled by the word which precedes it. . . . The servant, we must hold, intended by the Act, is one of a humbler character who does work similar to that required of a 'labourer,' a word which in common parlance, imports one who is engaged in manual toil, one who works, chiefly at all events, with his hands, and not with his head, and does not properly describe a person occupying the trusted and responsible position of the plaintiff. . . . I do not forget that the plaintiff's remuneration is called 'wages,' and not 'salary,' and that it is reckoned by the day and payable at short intervals; but taking all the circumstances together this is not enough to justify us in holding that he is a 'labourer' or 'servant' under the meaning of the Act."

¹ *Dudley v. Toledo, etc., R. Co.* (1887) 65 Mich. 657; *Chicago & N.R. Co. v. Sturgis* (1880) 44 Mich. 538; *Blanchard v. Portland & R.F.R. Co.* (1895) 87 Me. 241, 32 Atl. 890.

² *Missouri K. & T.R. Co. v. Baker*, 14 Kan. 563.

³ *Blanchard v. Portland & R.F.R. Co.* (1895) 87 Me. 241, 32 Atl. 890.

⁴ In *New South Wales* it has been held that a sub-contractor is entitled to sue a contractor under the Act. *Ex parte Walker* (New So. Wales 1885) 2 W.N. 112.

In § 2 of the New Zealand Workmen's Wages Act, 1893, the term

Having regard to the essential object of these Acts, it is clear that they are not applicable to persons hired directly by the principal employé, without the intervention of a contractor¹, nor to persons who merely contract for the supply of articles and perform no labour².

15. — of statutes permitting claims for wages to be enforced against exempt property.—(a) "*Labourer or servant.*" It has been held with reference to a statute in which this combination of words occurs, that the term "labour," bears the meaning which is commonly attached to it in other enactments relating to the wages of servants, viz., an employé whose work is entirely or principally manual; and that this meaning controls that of the word "servant" with which it is coupled. Accordingly the scope of the statute is not so enlarged by the insertion of the latter word as to cover such employés or traveling salesmen³.

(b) "*Debts or claims for labour.*" This phraseology has been held to cover the remuneration of an attorney for services in having a homestead set apart, and in maintaining the application against the attacks of creditors⁴. These rulings, it is clear, are essentially inconsistent with the doctrine of the case cited in the preceding subdivision. They are also opposed to the general doctrine of which that case is merely a single illustration, viz., that the word "labour" is always to be taken as importing "manual labour," unless it is qualified by some words in the context from which the intention of the legislature to enlarge its ordinary scope can reasonably be inferred.

"workman" is defined as "any person in any manner engaged in manual labour, or in work of any kind, whether his remuneration is to be according to time or by piece-work, or at a fixed price, or otherwise howsoever."

Persons who did work under a written contract, and were paid by the cubic yard, and not by wages, were held to be "workmen" within the earlier Act of 1871. *German v. Pell*, 2 New Zeal. J.R.N.S. S.C. 91.

¹ *Cash v. Chaffee* (1897) 15 New Zealand L.R. (S.C.) 416.

² *Jones v. Conlon*, Tarl. (New So. Wales) 45.

³ *Epps v. Epps* (1885) 17 Ill. App. 196.

⁴ *Strohecker v. Irvine* (1886) 76 Ga. 639.

18. — of statutes exempting wages from attachment.—(a) "*Labourer*." This word, as used in the Scotch statute, has been held to include a lamplighter of a burgh, although the contract of hiring required him to employ two assistants during the winter¹.

An overseer who by the terms of his agreement with his employer, was to pay his wages weekly in order to enable him to supply his family with the necessities of life, has been declared to be within the Georgian statute by which "*journeymen, mechanics, and day-labourers*" are exempted from garnishment as regards their daily, weekly, or monthly wage². This decision, it is apprehended, would not receive approval in other jurisdictions. It is difficult to see by what phraseology the legislature could more distinctly have manifested its intention to restrict the exemption, to subordinate employés performing manual labour.

(b) "*Labourers and employés*." It has been declared that the president of a railroad company is not within a statute by which the "*wages of labourers and employés*" are exempted from garnishment³. The decision proceeded upon the grounds that the words used to designate the persons covered by the statute conveyed the idea of subordinate occupations and that the term "*wages*" was indicative of an inconsiderable remuneration.

(c) "*Labourer or other employé*." With reference to a statute in which this combination of words is used, it has been held that a person who had contracted to erect, superintend, and otherwise direct the construction of a building for a percentage of the cost is an "*employé*" in the receipt of "*wages or hire*"⁴.

¹ *M'March v. Emslie* (1888) 15 Sc. Sess. Cas. 4th Ser. 375.

² *Caraker v. Mathews* (1858) 25 Ga. 571 (diss. Benning, J.).

³ *South & N. Ala. R. Co. v. Falkner* (1873) 49 Ala. 115.

⁴ *Moore v. Heaney* (1859) 14 Md. 558. The court argued thus: "A labourer, when engaged in service, under contract for compensation, is an employé, but after saying a 'labourer' there is added, 'or other employé.' Surely, in this was meant more than a labourer, or else, why, after using that word, add those which follow? If they only mean persons who are included within the meaning of the word labourer, they are mere tautology and useless."

(d) *Applicability to public employés.* Although the subject does not properly fall within the scope of this treatise it may be mentioned that the doctrine usually adopted in the United States, on grounds of public policy is, that the remuneration of such persons is not subject to garnishment, whether they are within the express terms of the exemption statutes or not¹. In some jurisdictions, however, special provisions have been enacted with regard to the attachment or garnishment of their salaries or wages².

17. — of statutes regulating the times at which wages are to be paid.—The generality of the expression “employés” which is used in the New York statute is deemed to be somewhat restricted by the use of the word “wages” as descriptive of the character of the remuneration. That word is distinguished from “salary,” and treated as covering only the pay of labourers entitled to be compensated on the footing of the services actually rendered, and not that of public officers or clerks who receive salaries not due till the end of the year³.

18. — of statutes enabling servants to recover attorneys’ fees in suits for wages.—In construing a statute which by its terms is for the benefit of “mechanics, artisans, miners, labourers and servants,” the Illinois Court of Appeals proceeded upon the theory that the word “servants” included only employés *ejusdem generis* with those specifically enumerated, and refused to allow attorney’s fees to a travelling salesman⁴.

² See note to *Dickinson v. Johnson*, 54 L.R.A. 566.

³ For the American cases see the above note at p. 570.

⁴ *People, Van Valkenburgh v. Myers* (Sup. Ct.), 25 Abb. N. Cas. 368, 33 N.Y.S.R. 18, 11 N.Y. Supp. 217 (Laws, 1890, ch. 388).

See also *People v. Buffalo* (1890) 57 Hun. 577, where it was laid down that the word “employés” when read in connection with the word “wages” and with reference to the considerations which induced the enactment of this statute is to be taken as being limited to labourers and workmen, and therefore not applicable to a clerk in the office of the mayor of a city, a secretary or treasurer of a park commission, a member of a fire department, a police patrolman, or a school teacher.

⁵ *Standard Fashion Co. v. Blake* (1894) 51 Ill. App. 233.

19. — of statutes regulating the hours of work.—(a) *Public work*. Speaking generally, enactments by which the length of a legal day's work is fixed with respect to the employés of the State or a political division thereof are applicable to all persons who perform manual labour of any description¹. But persons who hold regular offices, by election or appointment, and receive a stated salary, are not within their purview².

It has been held that the crew of a ship belonging to the War Department are not within the Federal Eight Hours Law as regards their ordinary duties upon the ship. The statutory penalty cannot be imposed unless they have been required, aside from those duties, to labour for more than eight hours in a day upon a public work—such as removing snags and obstructions from navigable waters³.

(b) *Private work*. The question whether the statutes relating to private employments are applicable to servants permanently engaged or only to those who are hired for a day or other short period depends upon the phraseology used by the legislature, and the primary and essential purpose of the enactment in question. Provisions induced mainly by sanitary considerations are perhaps usually to be regarded as including only servants who are steadily employed⁴. On the other hand some

¹ A person working on the streets of a city, under an ordinance requiring the performance of two days' work or the payment of a poll tax, has been held to be a "labourer" for the city, within the meaning of the Kansas "eight hour law" 1891, ch. 114. *Re Ashby* (1899) 60 Kan. 101, 55 Pac. 336.

The New York Labour Law which is applicable to "employés," and in which that term is defined as including "mechanics, workingmen, and labourers," in the service of municipal corporations, has been held to include a driver in the street-cleaning department of a city. *McNulty v. City of New York* (1901) 60 App. Div. 250, 70 N.Y.S. 133.

² *State ex rel. Ives v. Martindale* (1891) 47 Kan. 150.

The eight-hour law of New York, Laws 1870, ch. 385, which is made applicable to mechanics, workingmen, or labourers in the employ of the state or engaged upon public works, does not apply to town or other officers. Opinion of Atty-Gen. N.Y. 504.

³ *United States v. Jefferson* (1894) 60 Fed. 736.

⁴ The provision in Mass. St. 1874, ch. 221, § 1, as amended by St. 1880, ch. 194, § 1, by which the hours of labour of minors and women "employed in labouring" in a manufacturing establishment, are regulated has been held to be applicable only to such persons as are permanently

of those which may be supposed to be chiefly intended to regulate the relations of employers and employés in a financial point of view have been construed as being designed for the benefit only of persons who perform casual labour'. In one statute of this latter type there is a express exception of monthly labour'.

The terms in which these statutes are usually couched are usually such as to show unmistakably that they are not intended to apply to services of an official character—such as those performed by deputy sheriffs appointed to and in preserving the peace'.

20. — of statutes granting a preference to claims for wages in the administration of decedents' estates.—(a) *Scope as determined by the reasons for enacting them.* The statutes by which it is provided that, in the administration of the estates of deceased persons, the wages of their servants shall be treated as priority, have, like others of an analogous character, been induced by "motives of compassion towards a class of people whose poverty renders them not very well able to bear the loss of any part of the pittance they may have earned"¹.

therein employed. *Comm. v. Osborn Mill* (1880) 130 Mass. 33. (Complaint which alleged that a manufacturing corporation employed a certain woman, without having posted a printed notice in a conspicuous place in the room where she was employed, stating the number of hours work required of such persons on each day of the week, was held to be insufficient.)

¹ It has been held that only labourers employed by the day are within Indiana Act of 1889, p. 143. *Helphenstine v. Hartig* (1892) 5 Ind. App. 172.

Similarly it has been held that the Michigan Act No. 137, Laws of 1885, making ten hours a legal day's work, does not apply to a contract with an expert in taking, finishing, and retouching photographs. *Schurr v. Savigny* (1891) 85 Mich. 144, 48 N.W. 547. The court laid down the general rule that the statute was not intended to cover employment under a hiring by the week, month, or year.

² See *Bachelder v. Bickford* (1872) 62 Me. 526, where it was held that an employment under a contract to work in a grist mill at a certain rate per day to be paid weekly, was not within the exception.

³ *County of Christian v. Merrigan* (1901) 191 Ill. 484, 61 N.E. 479, Aff'g. 92 Ill. App. 428. Hurd's Rev. Stat. 1899, p. 840, § 1.

⁴ *Boniface v. Scott* (1817) 3 Serg. & R. 351. Compare also the remark in the later case, *Martin's Appeal* (1859) 33 Pa. 395, that the purpose of the Act was to afford protection to a class of persons which especially needs it.

(b) *On what footing construed.* It has been laid down that these statutes are to be liberally construed².

(c) *Employés within their purview.* By the courts of Pennsylvania the doctrine has been adopted that a statute of this description which uses only the expression "servants" is applicable only to those engaged in household duties³.

In this point of view it is clear that priority cannot be claimed by a person who only worked as a clerk in a counting house⁴; nor by a person engaged exclusively in farm-work⁵. But the decisions as to claimants whose duties were partly domestic, and partly of another character are not entirely consistent. On the one hand the statute has been held to be applicable to a bar-

² *Martin's Appeal* (1859) 33 Pa. 395.

³ The leading case is *Ex parte Meason* (1812) 5 Binn. 16, in which three carefully written opinions were delivered. It will be useful to give some extracts from that of Yeates, J.: "The great difficulty of this case, is to affix a correct and precise meaning to the words servants' wages in this law. Upon all hands it is agreed, that they cannot be confined to slaves, or indented servants, who are not entitled to wages; and that they cannot be extended to the relation of master and servant in the general legal sense of those terms, where one acts under the direction or command of another, because no reasonable ground of preference can be assigned to the character of servants in such large and comprehensive acceptance. The ancient common law was highly favourable to the demands of servants in the order of administration, inasmuch as it is said they were to be paid among the first debts. Bracton, lib. 2, 4, 26, Fleta, lib. 2, ch. 57, § 10. By those authors they are called *servitia servientium et stipendia famulorum*." The learned judge then referred to the significance of the fact that, in the statute under discussion, (Act of April 19, 1794, § 14), the provision of the earlier statute of 1705, by which the wages of "workmen and servants" were placed upon an equal footing, had been altered by the omission of the reference to "workmen." His conclusion was that "the word 'servant' must be restricted to its common and usual sense, as understood by householders. It signifies a hireling, one employed for money to assist in the economy of a family, or in some other matters connected therewith. I count it of no moment that the party hired does not sleep or eat within the walls of the house. I denominate a gardener, coachman, footman, etc., who live out of the family, as servants within the true meaning of the Act. Not so of a clerk or bookkeeper, who, however meritorious his services might be, would scorn to be placed in the rank of servitude. Nor can I conceive the smallest propriety in calling those persons who were employed by James Ashman in his life time in the manufacture of iron and business incident thereto, servants, and therefore entitled to a preference as such. They would justly be styled workmen, under the operation of the Act of 1705."

⁴ *Boniface v. Scott* (1817) 3 Serg. & R. 351. Compare also the remark preceding note.

⁵ *Re Seidler* (1877) 1 Chest. Co. Rep. 52.

keeper in a country tavern, the *ratio decidendi* being that, under such circumstances the concerns of the tavern were blended with those of the family¹; and also to a man whose work was principally in a slaughter-house and store, but who lived in the decedent's family and performed domestic duties, when he was required to do so¹. On the other hand priority has been refused to the wages of a man whose main duties were that of a farm-labourer, but who occasionally discharged some domestic offices².

The Supreme Court of Kansas has declined to follow the Pennsylvania doctrine, and held that a clerk is a "servant"³.

21. *Applicability of statutes to persons other than the servants of the party charged with liability.*—Most of the provisions discussed in the preceding sections are drawn in terms which distinctly import that they are intended to be operative only in cases where the relationship between the person from whom and the person to whom the remuneration in question is due is that of master and servant. As a general rule, therefore, their applicability in any given instance is negatived if either one of these two situations is established by the evidence:

(1) That the person who performed the services was, in respect to the performance, under the control of some person other than the one from whom the remuneration is claimed⁴.

¹ *Boniface v. Scott* (1817) 3 Serg. & R. 351.

² *Re Miller's Estate* (1828) 1 Ashm. 323 (Orphan's Court). The court took the broad position that partial employment as a domestic servant was enough to bring a claimant within the Act.

³ *McKim's Estate*, 2 Clark 224.

⁴ *Carwood v. Wolfley* (1896) 56 Kan. 281, 31 L.R.A. 538, 43 Pac. 236.

⁵ *United States v. Driscoll* (1871) 96 U.S. 421, 24 L. ed. 847. (Federal Eight Hours Law held not to give an employé of a contractor performing public work any rights against the Government); *St. Louis & N.A.R. Co. v. Rogers* (Ark. 1904), 79 S.W. 794; (person rendering services to a railroad contractor, held not to be within the scope of a statute giving a lien to every person who performs valuable services by which the railroad receives a benefit); *Guion v. Brown* (1851) 6 La. Ann. 112 (servant of accountant employed by a commercial firm to post its books not entitled to a privilege as against the firm); *Gallagher v. Ashby* (1857) 26 Barb. (N.Y.) 143 (statute making stockholders individually liable to "labourers and servants," not applicable to labourers hired by

The express object of one group of statutes, however, is to render principal employers liable for the wages earned by the servants of contractors. See § 10, *ante*.

(2) That the work was performed by an independent contractor or by a person engaged in a trade or profession on his own account. In the note below numerous authorities are cited in which the applicability of statutes of different descriptions to cases involving this situation was denied. In order to show more clearly the full effect of the decision the words or phrases used in the given provision for the purpose of designating the employés are specified¹.

contractors); *Marks v. Indianapolis B. & W.R. Co.* (1871) 38 Ind. 440. In *Re Seider's Appeal* (1863) 46 Pa. 57, it was held that a helper employed and paid by the chief workman was entitled, under Pennsylvania Act of April 2, 1849, to a preference out of the assets of the latter's employer; but the decision proceeded upon the ground that the chief workman acted as an agent of his employer in employing the helper.

¹ (a) *Statutes concerning liens and preferences.* In the following cases independent contractors were declared not to be entitled to priority as regards their compensation. *Ex Parte Ball* (1853) 3 De G. & M. & S. 155 ("servants or clerk": for facts, see § 2, note 7, *ante*); *Vane v. Newcomb* (1889) 132 N.S. 220, 33 L. ed. 310 ("employés"); *Campfield v. Lang* (1885) 25 Fed. 128 ("labourers, servants, and employés"); *Bankers & M.T. Co. v. Bankder & M.T. Co.* (1886) 27 Fed. 536 ("employés"); *Todd v. Kentucky U.R. Co.* (1892) 18 L.R.A. 305, 52 Fed. 241 ("employés" and "labourers"); *Malcomson v. Wappoo Mills* (1898) 85 Fed. 907 ("labourers" and "employés"); *Cochran v. Swan* (1874) 53 Ga. 39 ("labourer"); *Re Clark* (1892) 92 Mich. 351 ("labour debts"); *Re Barr B.P. & D. Co.* (N.J. Eq. 1899), 42 Atl. 575 ("labourers"); *Lehigh Coal Co. v. Central R.R. Co.* (1878) 29 N.J. Eq. (2 Stew.) 252 ("labourers"); *Charron v. Hale* (Sup. Ct. 1899) 54 N.Y. Supp. 411, 25 Misc. 34 (employés, operatives and labourers); *Re Repson C. & N.T. Co.* (1901) 32 Misc. 56 ("employés, operatives, and labourers") *Re Seider's Appeal* (1863) 10 Wright 57 ("labourers"); *Wentworth's App.* 82 Pa. 469; *Llewellyn's Appeal* (1876) 103 Pa. 458 ("labourers"); *Com. v. Marsh* (Pa. Q.S.) (1894) 3 Pa. Dist. R. 489, 14 Pa. Co. Ct. 369 ("labourers"); *Gross v. Eiden* (1881) 53 Wis. 543 ("labourer"); *Lang v. Simmons* (1885) 64 Wis. 525 ("labourers, servants or employés").

Compare also *Ney v. Dubuque R. Co.* (1866) 20 Iowa 347, in which a decree of a court providing for the payment of the "employés" of a railway company was held not to be applicable to an independent contractor.

In the two following cases the facts of which are stated in greater detail in § 2, note 7, *ante*, persons following independent occupations were held not to be entitled to a preference. *Ex parte Butler* (1857) 28 L.T. O.S. 357; *Ex parte Walter* (1873) L.R. 15 Eq. 412; 42 L.J.B. 49, 21 W.R. 53.

In *Conlee L. Co. v. Ripon L. & M. Co.* (1886) 66 Wis. 481, a carriage maker and blacksmith who kept a shop of his own and from time to time manufactured articles for the insolvent was held not to be within the description "labourers, servants, and employés."

In *Re Kimberley* (1899) 37 App. Div. 108, a person engaged in a general trucking business was held not to be an "employé."

In one case it has been denied that an insurance adjuster is not a

If the evidence shows that the claimant was under the control of his employer in respect of the details of the stipulated

"clerk, servant or employé" of the insurance company. *Boston & A.R. Co. v. Mercantile T. & D. Co.* (1896) 82 Md. 535, Atl. . . But this doctrine would clearly not be applicable to all employés of that description. For the facts of the case, see § 8(c), *ante*.

The doctrine applied in one case was that an attorney not employed for any particular period, nor at a fixed price, is not within a statute according a preference to the "wages" of "employés, operatives and labourers." *People v. Remington* (1887) 45 Hun. 329, Aff'd. in 109 N.Y. 631, N.E. . . The actual *ratio decidendi* was that sums due for professional services are not "wages." But the refusal to allow the claim might have been put on the ground the statute was obviously intended to be applicable to persons whose relation to the corporations in question was that of servants.

In another it was held that an attorney not on regular, continuous service was an "employé" under a statute preferring "clerks, servants, and employés." *Louis v. Fisher* (1894) 80 Md. 139, 26 L.R.A. 278.

The following decisions regarding attorneys, although they are, strictly speaking in point, may also be referred to in connection with the above cases.

The term "wages of employés" in an order requiring a railroad receiver to pay such wages, does not include services of counsel employed for special purpose. *Louisville R. Co. v. Wilson* (1890) 138 U.S. 531, 34 L. ed. 1033.

An attorney is not a "servant" or "employé," nor are the fees due to him for special services "wages" or "salary," within a statute according a preference to "wages or salaries to clerks, servants or employés." *Lewis v. Fisher* (1894) 26 L.R.A. 278, 80 Md. 139.

A lawyer employed by a railroad company at a fixed salary per month is within an order directing the payment of wages due to "employés" for labour and services. *Finance Co. v. Charleston C. & C.R. Co.* (1892) 52 Fed. 526.

A claim of counsel for professional services rendered to a railroad company is within an order appointing a receiver directing him to pay debts "owing to labourers and employés" of the company "for labour and services." *Gurney v. Atlantic & G.R. Co.* (1874) 58 N.Y. 358, Rev'g. 2 Th. & C. 446 (cases involving liability to stockholders referred to, *arguendo*).

That a person who lets out the services of another is not a "clerk" within the meaning of the provision regarding privileges in the Louisiana Code, was held in *Guion v. Brown* (1851) 6 La. Ann. 112.

The same rule has been made with regard to a man employed to sell goods, under a contract, which provided that he was to receive half the profits, and bear half the losses of the business. *Brierre v. Their Creditors* (1891) 43 La. Ann. 423, 9 So. 640.

(b) *Statutes making individual stockholders individually liable for labour debts.* *Peck v. Miller* (1828) 39 Mich. 594; *Taylor v. Manwaring* (1882) 48 Mich. 171; *Boutwell v. Townsend* (1866) 37 Bart. 205; *Coffin v. Reynolds* (1868) 37 N.Y. 640; *Moyer v. Pennsylvania Slate Co.* (1872) 71 Pa. 293 (decided on the ground of a strict construction of the words, "mechanics, workmen, and labourers").

In *Aiken v. Wasson* (1862) 24 N.Y. 482, the court, in discussing the import of the words "labourers and servants" as used in the New York Railroad Act, 1850, § 10, said: "It is obvious from the nature and terms of this and other provisions of the Act, as well as from a general policy

work, he is not excluded from the operation of these statutes, although he may have furnished at his own expense the instru-

indicated by analogous statutes, that the legislature intended to throw a special protection around that class of persons who should actually perform the manual labour of the company. To accomplish this design, it is not necessary that the words 'labourers and servants' should receive their broadest interpretation. Indeed, such a construction would scarcely harmonize with the general scope and object of this and similar Acts. In some very extended sense, the directors and other principal officers of the corporation may be considered as its agents and servants, and yet no one, I apprehend, would contend that the provision was intended for their benefit. The word 'servant' is qualified, and to some extent limited in its meaning, by its association with the word 'labourers,' according to the familiar maxim, *noscitur a sociis*. It clearly would not include every one who should perform any service in any form for the company. Such a construction is repelled, not only by the apparent reason for the enactment, but by the language used, which would naturally have been far more general if such had been its object."

(c) *Statutes making principal employers liable for the wages of the employés of contractors.* In *Chicago & N.E.R.R. Co. v. Sturgis* (1880) 44 Mich. 538, and *Martin v. Michigan & O.R.R. Co.* (1886) 62 Mich. 458, contractors and subcontractors were held not to be "labourers" within the meaning of a statute of this description. In Maine it has been held that such a statute does not apply to the personal labour of a subcontractor who has worked together with the crew employed by him upon a section of a railroad which he has contracted to build. *Rogers v. Dexter & P.R. Co.* (1893) 85 Me. 372, 27 Atl. 257 (Rev. Stat. ch. 51, § 141).

That the term "labourer" could not be construed as designating one who contracted for and furnished the labour and services of others, or one who contracted for and furnished one or more teams for work, whether with or without his own services, was held in *Balch v. N. Y. & Oswego Midland R. R. Co.* (1871) 46 N. Y. 521.

A subcontractor has, however, been held to be within the purview of Mass. Stat. of 1873, ch. 353, by which a right of action against the owner of a railroad is given to "any person to whom a debt is due for labour performed, by virtue of an agreement with the owner, or with any person having authority from or rightfully acting for such owner in procuring or furnishing such labour." *Hart v. Boston* (1877) 121 Mass. 510.

(d) *Statutes exempting wages from attachment.* In two Pennsylvania cases it has been laid down that the "wages of labourers" which are protected by a statute of this description are the earnings which a labourer acquires by his personal toil, and not the profits which a contractor derives from the labour of others. *Smith v. Brooke* (1865) 13 Wright 147, following *Heebner v. Clave* (1847) 5 Ban. 115. This statement does not cover cases in which a single person works in the capacity of an independent contractor. But it can scarcely be supposed that the court intended to exclude such a situation from the operation of the doctrine affirmed.

(e) *Statutes regulating the hours of work.* In *Billingsley v. Marshall County* (1897) 5 Kan. App. 435, 49 Pac. 329, a contractor was held not to be within the descriptive terms, "labourers, workmen, mechanics, or other person."

(f) *Statutes requiring the payment of wages at certain intervals.* One employed by a corporation to cut merchantable timber, under a contract which provides for settlement each month, but for the retention of 25 per cent. of the amount due, not exceeding a specified sum, as security

mentalities necessary for the performance of that work³; or may have been aided in the performance by his own servants⁴; or may have been paid according to the quantity of work performed by him⁵.

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for the satisfactory completion of the job, was held not to be an "employé," within a local statute providing for the appointment of a receiver of any corporation which neglects or refuses to pay its employés for the space of thirty days. *McCulloch v. Renninger* (Md. 1899), 44 L.R.A. 413; (Md. Acts of 1878, ch. 108).

³ Thus a drayman, who furnishes his own team, but worked for a corporation regularly, and almost constantly and exclusively, and was entirely under its control as to all matters within the scope of the employment, was held to be a labourer within § 63 of the New Jersey Corporation Act. *Watson v. Watson N. Co.* (1879) 30 N.J. Eq. 588 (see § 7, note 8, *ante*).

⁴ In *Hopkins v. Cromwell* (1904) 89 App. Div. 481, the claimant had in the name of a corporation engaged in the wholesale pickle business, purchased pickles in the vicinity of his residence, received the pickles, prepared them for shipment and shipped them as ordered by the corporation, under an agreement by which he was to receive a certain sum for every hundred pounds of pickles purchased when delivered on the cars. The work was done by him personally with the occasional assistance of his own man of all work, and the help of coopers furnished a few weeks during the spring by the corporation. Held, that he was entitled to a preference under New York laws of 1897, ch. 6, § 9.

⁵ *Re Alsopp* (1875) 32 L.T.N.S. 43 (which overrides *Ex parte Grellier* (1831) Mont. 264); *Thayer v. Mann* (1848) 56 Mass. 371; *Hopkins v. Cromwell*, 89 App. Div. 481, N.Y. Supp.; *O'Brien v. Hamilton*, 12 Phila. 387; *Carlisle v. Brogden*, 1 New Zeal. Jur. Rep. 169; *Guian v. Pell*, 1 New Zeal. Jur. Rep. S.C. 91.

*AMENDMENT TO THE EXCHEQUER COURTS
ACT.*

A bill relating to the Exchequer Court of Canada has recently passed the House of Commons, and will, no doubt, become law. One amendment to the present law provides that "In case of the illness of the judge of the court, or if the judge has leave of absence, the Governor in Council may specially appoint any person having the qualifications hereinbefore mentioned to discharge the duties of the judge during his illness or leave of absence; and the person so appointed shall, during the period aforesaid, have all the powers incident to the office of the judge of the court."

Another clause provides that "Any judge temporarily appointed to discharge the duties of the judge may, notwithstanding the expiry of the term of his appointment, or the happening of any event upon which his appointment terminates, proceed with and conclude the trial or hearing at that time actually pending before him of any cause, matter or proceeding, and pronounce judgment therein, and may likewise pronounce judgment in any cause, matter or proceeding previously heard by him and then under consideration or reversed," as the Act will take effect as from the first day of January last.

This amendment will cover the case of the judgments delivered by the late acting judge, Sir T. W. Taylor, on the morning of the day Judge Burbidge died. While it is possible that the judgments might be valid it was thought advisable to settle the question by legislation.

Another clause of the bill provides that if the judge has "other judicial duties" which make it impossible for him to hear, without undue delay, any case or matter, the Governor in Council may, upon the written application of the judge, appoint another person to act as judge pro hac vice. This clause was intended by the Minister of Justice to cover the case of Mr. Justice Cassells, who is now conducting an enquiry into the

Department of Marine and Fisheries. Whether or not it has this effect is we think open to very serious doubt. We cannot see how this service can be said to be covered by the words "other judicial duties." The duties are not judicial in any sense and they might appropriately be performed by a layman. There is nothing calling for the services of a judge as such.

The registrar of the court is also given the powers of a judge of the Exchequer Court sitting in chambers. Similar power has already been given to the registrar of the Supreme Court of Canada. We have referred to this matter, ante, p. 291.

Whilst thanking our correspondent, Mr. Gamble, K.C., for his letter published in our last issue in reference to our note on p. 298 respecting *Labelle v. O'Connor*, we think he is not borne out by the judgments of the majority of the court. We refer particularly to what is said by MacMahon, J., at p. 539 of 5 O.L.R. and by Anglin, J., at p. 559, from which it is perfectly plain that the decisions of the Court of Appeal in *Fraser v. Ryan*, 24 A.R. 441, and of Street, J., in *Gibbons v. Cozens*, 27 O.R. 356, to the effect that a purchaser failing to complete his contract forfeits not only any deposit but also all payments made on account of his purchase money, were not followed in *Labelle v. O'Connor*. The court held that the money in question had not been paid as a deposit, but as an instalment of purchase money, and practically ordered it to be refunded. *Fraser v. Ryan* was we see referred to, but this makes the refusal to follow it the more pointed.

REVIEW OF CURRENT ENGLISH CASES.

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LIQUOR LICENSES—PERMITTING DRUNKENNESS—LODGER AT HOTEL
—ARRIVAL OF LODGER IN DRUNKEN CONDITION—LICENSING
ACT, 1872 (35-36 VICT. c. 94) s. 13—LICENSING ACT, 1902
(2 EDW. VII. c. 28) s. 4—(R.S.O. c. 245, ss. 75, 76).

Thompson v. McKenzie (1908) 1 K.B. 905 was a prosecution for permitting drunkenness by the defendant on licensed premises. The facts were, that a person in a drunken condition applied at the defendant's hotel for lodging after closing hours and was admitted, he was subsequently discovered on the premises by a police officer. The Act of 1872, s. 13, is in somewhat similar terms to R.S.O. c. 245, s. 76, but the Act of 1872 also expressly authorizes any licensed person to refuse to admit to his premises any person in a state of intoxication. The Ontario Statute, s. 75, imposes a penalty on a tavern keeper refusing to supply lodging except for some valid reason. In the present case a Divisional Court (Lord Alverstone, C.J., and Lawrance and Sutton, JJ.) on a case stated by a magistrate, held that the defendant in not exercising the power given him by statute of refusing to admit the drunken applicant, thereby rendered himself unable to discharge the onus cast upon him of shewing that he took all reasonable steps for preventing drunkenness on his premises, and that it was immaterial that he had not himself supplied the drunken person with liquor. In view of this case, it would seem that under the Ontario Act, the fact that an applicant for lodging at a tavern is drunk would be "a valid reason" for refusing him admission, and the tavern keeper would subject himself to a penalty under s. 76 if he did not refuse to receive such an applicant.

MARINE INSURANCE—WARRANTY AGAINST CONTRABAND OF WAR—
"CONTRABAND PERSONS"—BREACH OF WARRANTY.

In *Yangtze Insurance Association v. Indemnity Mutual M. A. Co.* (1908) 1 K.B. 910, the short point was whether a warranty in a policy of marine insurance against carrying "contraband of war" was broken by the transport of military officers of a belligerent state. In some text-writers the phrase contraband persons is used, but Bigham, J., was of the opinion that the ordinary meaning of the term "contraband of war" is that it applies only to goods and not to persons, and, therefore, the

carriage as passengers of military officers of a belligerent state, was not a branch of the warranty.

WATERWORKS—NEGLECT TO SUPPLY WATER FOR DOMESTIC PURPOSES—INSUFFICIENCY OF SUPPLY.

Simpson v. South Oxfordshire Water & Gas Co. (1908) 1 K.B. 917. By a statute a water company neglecting or refusing "to furnish to any owner or occupier entitled under this or any special Act to receive a supply of water (sic) during any part of the time for which the rates for such supply have been paid" were liable to a penalty. The plaintiff who was entitled to receive a supply of water for domestic purposes, complained that the supply furnished was insufficient and the application was brought to recover the penalty, but on a case stated by justices a Divisional Court (Lord Alverstone, C.J., and Lawrance and Sutton, JJ.) it was held that the provision above referred to only applied to a total cessation of the supply and not to a neglect to furnish a sufficient quantity and therefore the applicant could not succeed.

BANKRUPTCY—SHAM SALE BY BANKRUPT—PART PAYMENT OF PURCHASE MONEY—RIGHT OF PROOF BY SHAM PURCHASER FOR MONEY ACTUALLY PAID.

In re Myers (1908) 1 K.B. 941, although a bankruptcy case is one that deals with a point of general interest. Joseph Myers purchased a business and stock in trade for £1,000 to secure which he gave promissory notes on which his brother Abel became surety. Joseph subsequently got into pecuniary difficulties and made a sham sale of the business to Abel and by way of part payment Abel assumed the liability for the notes given on the original purchase. Joseph subsequently became bankrupt and the sale to Abel was declared null and void. Abel paid the notes which he had thus assumed and claimed to prove as a creditor of Joseph for the amount so paid, but it was held by Bigham, J., upon the authority of *In re Cross* (1848) 4 DeG. & Sm. 364 n. and *Ex parte Phillips* (1888) 36 W.R. 567, that although the debtor's estate had profited by the payment of the notes yet Abel could not be allowed to prove against his estate in respect thereof as the money had been paid in the course of carrying out a transaction devised in fraud of creditors. The result was that so much of the fraudulent agreement as was disadvantageous to Abel and precluded him from having recourse against Joseph or his estate was binding on him, though the

part which was advantageous to him did not bind the other creditors. A somewhat similar state of things arose in the case of *Pringle v. Obspinetsky* recently before a Divisional Court (26 March, 1908). In that case an exchange of lands was attacked as fraudulent against creditors, and the transaction set aside, but it was held that the fraudulent grantee was entitled to get back the lands which he had given in exchange.

ASSAULT—SCHOOLMASTER—ASSISTANT TEACHER—CORPORAL PUNISHMENT OF PUPIL—SCHOOL REGULATIONS—NEW TRIAL—BIAS OF JURY—WEIGHT OF EVIDENCE.

Mansell v. Griffin (1908) 1 K.B. 947. This was an appeal from a Divisional Court (Phillimore and Walton, JJ.) (1908) 1 K.B. 160 (noted ante, p. 198), granting a new trial. The appeal was dismissed by the Court of Appeal (Lord Alverstone, C.J., and Farwell and Kennedy, L.JJ.). That court declined to express any opinion as to whether or not an assistant teacher in an elementary school had any authority to inflict corporal punishment on a pupil otherwise than in accordance with school regulations.

PRACTICE—ACTION FOR “DEBT OR LIQUIDATED DEMAND IN MONEY”
—CLAIM FOR INSTALMENT OF PRICE OF SHIP—RULE 115—
(ONT. RULE 603).

Workman v. Lloyd Brazileño (1908) 1 K.B. 968. In this case the action was brought to recover an instalment of purchase money agreed to be paid for the price of a ship. The plaintiff applied for judgment under Rule 115 (Ont. Rule 603) and the motion was resisted on the ground that the action being for the first of five instalments of the purchase money an action of debt would not lie until the whole of the instalments were due and that the demand was not liquidated because the measure of damages in an action for an instalment was not necessarily the amount of the instalment but unliquidated damages for breach of contract. The master granted the order which was affirmed by Walton, J., and the Court of Appeal (Lord Alverstone, C.J., and Farwell and Kennedy, L.JJ.) affirmed the order of Walton, J. We may note that a somewhat similar point was before the Ontario Court of Appeal recently in the case of *Vivian v. Clergue* in which the contract was under seal for the purchase of land; and that court also held that the plaintiffs were entitled to recover an instalment of purchase money notwithstanding that they still retained the property in the subject-matter of the contract.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.]

BATTLE v. WILLOX.

[May 5.]

*Contract—Share of profits—Absolute or conditional undertaking
—Construction of contract—Damages.*

A contract between W. and B. recited that W. owned land to be worked as a gravel-pit; that he was about to enter into contracts for supplying sand therefrom; and that he had requested B. to assist him financially to which B. had consented on certain conditions; it then provided that "the said W. is to enter into contracts as follows" naming five corporations and persons to whom he would supply sand to a large amount at a minimum price per hard; that B. would endorse W.'s note to the extent of \$5,000 and have 60 days to declare his option to take one-fourth interest in the profits from said contracts, or purchase a one-third interest in the property and business; that each party would account to the other for moneys received and expended in connection with the property; that if either party wished to sell his interest he would give the other the first choice of purchase; and that "each of the parties hereto agrees to carry out this agreement to the best of his ability according to the true intent and meaning of the same and to do what he can of mutual benefit to the parties hereto." B. indorsed notes as agreed. W. entered into two of the five contracts, sold a quantity of sand and then sold the property without notice to B. who brought an action claiming his share of the profits that would have been earned if the five contracts had been entered into and fully carried out.

Held, FITZPATRICK, C.J., and MACLENNAN, J., dissenting, that the undertaking by W. to enter into the five contracts was absolute and having by the sale put it out of his power to perform it he was liable to B. who was entitled to damages on the basis of the contracts having been carried out.

Held, also, DUFF, J., hesitante, that the clause quoted did not modify the rigour of the absolute covenant by W. to procure these contracts in any event.

Judgment of the Court of Appeal reversed, and the judg-

ment of the Divisional Court reversing that of ANGLIN, J., restored.

Battle, for appellant. *Collier*, K.C., and *Griffiths*, for respondent.

Que.]

MEIGHEN v. PACAUD.

[May 5.

Title to land—Construction of deed—Easement appurtenant—Use of lane in common with others—Overhanging fire-escape—Encroachment on space over lane—Trespass—Right of action.

A grant of the right to use a lane in rear of city lots "in common with others," as an easement appurtenant to the land conveyed, entitled the purchaser to make any reasonable use not only of the surface but also of the space over the lane. The construction of a fire-escape, three feet wide, with its lower end 17 feet above the ground (in compliance with municipal regulations), is not an unreasonable use, nor inconsistent with the use of the lane in common by others; consequently, its removal should not be decreed at the suit of the owner of the land across which the lane has been opened. Judgment appealed from affirmed, MACLENNAN, J., dissenting.

Campbell, K.C., and *Brosseau*, K.C., for appellant. *Mignault*, K.C., and *Beullac*, for respondent.

Que.]

[May 5.

QUEBEC RAILWAY, LIGHT AND POWER CO. v. FORTIN.

Negligence—Master and servant—Scope of employment—Insulation of electric wires—Onus of proof.

An electric line foreman in the company's employ, met his death from contact with imperfectly insulated live wires while at his work in proximity to them in the power-house. From the evidence, it was left in doubt whether the duties of deceased included the inspection and care of the wires both inside and outside of the power-house, there being no positive evidence to shew that he had been engaged to perform the duties in question except as to the wires outside the power-house walls.

Held, that the onus of proof as to the point in dispute was on the defendants, and such onus not having been satisfied, they were liable in damages. Appeal dismissed with costs.

Stuart, K.C., for appellants. *Alley Taschereau*, for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Riddell, J.—Trial.] REEVES v. REEVES. [May 13.

Will—Devise to "my wife" naming her by testator's surname, though not legally his wife.

The question at issue was as to the validity of a devise by one Frank Reeves to "my wife Jennie Reeves." One Switzer married Jennie Gordon and they lived together for several years. Switzer subsequently went to Detroit where he was granted a so-called divorce from his wife Jennie, who subsequently married Frank Reeves. The trial judge held that the divorce proceedings were illegal, and consequently that Jennie Reeves was not the lawful wife of the testator.

Held, that the devise of the property to "my wife Jennie Reeves" was good. The following cases were referred to: *Russel v. Lafrancois*, 8 S.C.R. 335; *Schloss v. Stiebel*, 6 Sim. 1; *Giles v. Giles*, 1 Keen 685; *In re Wagstaff* (1908) 1 Ch. 162.

Eyre, for plaintiff. *Hollis*, for defendant.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] JOHNSTON v. ROBERTSON. [April 4.

Discharge on habeas corpus—False imprisonment—Liability of solicitor procuring imprisonment.

The plaintiff was convicted for unlawfully selling liquor to an Indian in violation of the Indian Act, before the defendant as a stipendiary magistrate, who sentenced him to fine and imprisonment absolute. He appealed to the County Court where both penalties were reduced in his absence as he was confined in jail on a conviction under another penal statute. On the hearing of the appeal the defendant acted as counsel for the prosecutor, prepared the conviction and warrant, and by appointment handed them to the sheriff who executed them. The plaintiff

had been discharged by the court in banco, under a writ of habeas corpus, on notice to the defendant, the order reciting an adjudication that the conviction was illegal and without jurisdiction (*R. v. Johnston*, 41 N.S.R. 105, 11 Can. Cr. Cas. 10) and on that application the defendant filed an affidavit against the motion. In an action by the plaintiff against the defendant in his capacity as solicitor, for false imprisonment, the trial judge withdrew it from the jury at the close of the plaintiff's case, on the ground that there was no evidence of malice, and that the defendant's privilege as a solicitor protected him.

Held, dismissing the plaintiff's appeal and motion for a new trial that the plaintiff could be legally sentenced to imprisonment absolute in his absence by the County Court judge on the appeal, but assuming he could not, that the action of the County Court judge in so sentencing him was a mere error which did not invalidate the conviction, and as the defendant was not shewn to have acted maliciously or officiously, he was not liable in trespass.

Per TOWNSHEND, C.J., dissenting, that the conviction having been adjudged illegal, and without jurisdiction by the court, on the return to the habeas corpus, and defendant being shewn to have been the instrument in procuring, enforcing and upholding the invalid conviction, he was liable in damages, and the case should be remitted for a new trial.

J. J. Power, K.C., for the appellant. *W. B. A. Ritchie*, K.C., contra.

NOTE.—The plaintiff has appealed from the above decision to the Judicial Committee of the Privy Council.

Province of Manitoba.

COURT OF APPEAL.

Full Court.]

McMANUS *v.* WILSON.

[April 13.

Set-off—Unliquidated damages—Unconnected transactions.

Plaintiff sued for the balance due by defendant under an agreement to purchase land from one Walton, who had assigned the agreement to plaintiff. Defendant did not dispute the debt, but claimed the right to set off damages against Walton in

respect of some dealings in stocks, entirely unconnected with the agreement of sale.

Held, that such damages could not be set off against the assigned debt in the hands of the plaintiff.

Under s. 39(f) of the King's Bench Act, R.S.M. 1902, c. 40, anything of which the debtor could avail himself as an equitable set off to the assigned debt would be a defence to which the assignment would be subject, but a counterclaim for unliquidated damages arising out of a cause of action in no way connected with the claim assigned is not a defence or set-off, which would at any time have been recognized in a court of equity.

Government of Newfoundland v. Newfoundland Ry. Co., 13 A.C. 199, distinguished.

O'Connor and *Blackwood* for plaintiff. *Affleck*, for defendant.

Full Court.]

TEAGUE v. SCOLAR.

[May 6.]

Promissory note—Presentment for payment—Pleading in County Court action.

1. Under section 95 of the County Courts Act, R.S.M. 1902, c. 38, a plaintiff suing upon a promissory note payable at a particular place is not required to allege presentment for payment or to prove it at the trial unless non-presentment is set up by the defence.

2. Under ss. 114, 116 and 118 of the Act, a defendant intending to rely on non-presentment of such a note, must set up that defence in his dispute note or he cannot raise it at the trial except by special order of the judge.

Morley, for plaintiff. *St. John*, for defendant.

Full Court.]

VOPIN v. BELL.

[May 6.]

Husband and wife—Liability of wife for goods supplied to household.

Appeal from verdict of County Court judge holding a married woman living with her husband liable on an account for groceries and meat supplied by the plaintiffs for use in the household on the ground that the plaintiffs had always charged the goods to the wife and rendered the accounts from time to time in her name without objection.

Held, that there was nothing in that circumstance to displace

the presumption of law that the wife in ordering the goods was acting as her husband's agent, and that, as the plaintiffs knew that the wife was living with her husband, and there was no evidence of any special contract by which the wife made herself personally liable, the verdict against her must be set aside with costs.

Paquin v. Beauclerk (1906) A.C. 160 distinguished.

Dennistown, K.C., and *Hannison*, for plaintiffs. *Fillmore*, for defendant.

KING'S BENCH.

Mathers, J.]

[March 27.]

RE CANADIAN NORTHERN RAILWAY CO. v. ROBINSON.

Costs—Arbitration under Railway Act—Taxation of costs—Arbitrator's fees—Counsel fees—Fees of expert witness.

The sum awarded by the arbitrators having exceeded the amount offered by the company, the owner applied, under section 199 of the Railway Act, R.S.C. 1900, c. 37, for taxation of the costs of the arbitration by the judge. Following the practice in Ontario: *In re Oliver v. Bay of Quinte Ry.*, 7 O.L.R. 567, the judge referred the bill to the senior taxing master. The parties afterwards applied to the judge for directions to the taxing officer as to whether the costs should be taxed as between party and party or as between solicitor and client.

Held, following *Malvern Urban District v. Malvern*, 83 L.T. 326, that, under sub-section (5) of section 2 of the Act, interpreting the word "costs" as including "fees, counsel fees and expenses," the costs mentioned in section 199 should be taxed as between solicitor and client.

Held, also, that where, in the opinion of the taxing officer, the costs fixed by the tariff for ordinary litigation are inadequate compensation for the services necessarily and reasonably rendered, he is not bound by it and should not follow it.

After the taxing officer had completed his taxation, it was brought to the judge for confirmation, when the following rulings were made:—

1. For the purposes of the taxation of costs, the arbitration began when the company served notice upon the owner offering an amount which they were willing to pay, and naming its arbitrator, and items for work done even before that date should

be allowed if they were for work that would properly be costs of the arbitration if done after that date; for example, fee perusing the order of the Railway Commissioners giving leave to appropriate, and taking instructions.

2. The owner was entitled to tax the fees paid to the arbitrators as taking up the award. *Shrewsbury v. Wirral* (1895) 2 Ch. 812 distinguished.

3. Counsel fees allowed by the taxing officer were reduced to \$100 per day for first counsel and \$75 per day for second counsel.

4. The fees actually paid to expert witnesses should not necessarily be allowed, but only fair and reasonable fees for the time occupied in attending before the arbitrators and in qualifying themselves to give evidence.

5. The costs of the taxation, including a fee of \$25 for the argument before the judge, should be borne by the company.

A. B. Hudson, and *Ormond*, for Robinson. *Clark*, K.C., for the railway company.

Province of British Columbia.

SUPREME COURT.

Full Court.] HUNTING v. MACADAM. [April 29.

Landlord and tenant—Forfeiture of lease—Relief against—Non-payment of rent excused by oral assurance—Authority of landlady's husband—Mental incompetence—Knowledge of tenant.

Plaintiff as lessee, and defendant, as lessor, on January 1, 1906, entered into a lease for a term of five years at a rental of \$70 per month, in advance, with a proviso for forfeiture and re-entry after 15 days' default in payment of rent, together with an exclusive option of purchase on terms named. Plaintiff being absent in December, 1906, and up to January 23, 1907, inadvertently allowed the rent for January to fall into arrear, but, on the latter date tendered defendant, through her solicitor, she herself being inaccessible, the rent for January and February, and also offered to defray any costs incurred. Defendant had in the meantime, through her bailiff, taken and retained possession. There was evidence of an oral arrangement that in the event of the plaintiff's absence at any time the forfeiture clause for non-payment in advance would not be enforced.

Held, following *Newbolt v. Bingham* (1895) 72 L.T.R. 852, that no third party having intervened, plaintiff was entitled to relief against non-forfeiture, and that the case coming within Rule 976 of the Supreme Court Rules, 190 , plaintiff should also get the costs of the action.

Observations on the effect of s. 20, s-s. 7, Supreme Court Act.

Decision of HUNTER, C.J., affirmed.

Sir S. H. Tupper, K.C., for respondent. *Joseph Martin*, K.C., for respondent.

Book Reviews.

The Criminal Code and the Law of Criminal Evidence. By W. J. TREMEER, of the Toronto Bar. Toronto: Canada Law Book Co., Limited, Law Book Publishers, 32 Toronto St. Philadelphia: Cromarty Law Book Co., 1112 Chestnut St. 1908. 1030 pp.

As stated in the title page this is an annotation of the Criminal Code of Canada and of the Canada Evidence Act; with special reference to the law of evidence and the procedure in Criminal Courts, including the practice before justices and on certiorari and habeas corpus.

This second edition comes really in answer to a demand therefor by the profession who have evidenced their desire not merely by letters to that effect, but by the fact that the first edition was in a very few years exhausted. Moreover there was a necessity for a second edition in view of the re-arrangement of the sections of the Criminal Code by the revision of the statutes of Canada in 1906, and the many changes made in both the Code and the Canada Evidence Act since the first edition.

The volume before us is larger by several hundred pages than the first edition, and an examination of its contents shews that the whole work has been thoroughly re-written, and that much additional information is now given on subjects which were sparingly dealt with in the former edition. A noticeable feature is the addition of many new forms.

Mr. Tremear has established his reputation as a careful and methodical compiler, and he shews that familiarity with the principles of criminal law and procedure necessary for one who undertakes to give others full information on the subject.

The mechanical arrangement and the typographical execution of the book is of the highest character. A great improvement has been made by giving marginal notes, following in this particular the best specimens of English law books.

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FLOGGING.

Controversy has long existed as to whether the use of the lash as a punishment for, or deterrent from, crimes of a peculiarly brutal character, really answered the purpose for which it was intended. This mode of punishment was supported on the theory that the robber, for instance, who struck down his victim from behind, and beat him into insensibility that he might pick his pockets with impunity, or the brute who criminally assaulted a defenceless child were so thoroughly degraded that nothing but a sound flogging would appeal to their feelings. It is contended on the other hand that the degradation of the lash would only tend still further to degrade the criminal, and take from him whatever of human feeling he might still retain.

This view of the case was strongly and eloquently put by the present Premier of Great Britain, Mr. Asquith, also an eminent member of the English Bar, who speaking in the House of Commons in 1900 in opposition to Mr. Wharton's Corporal Punishment Bill said:—"I believe the majority of the English Bench, at present comprising some of the ablest and most experienced of our judges, have never in their lives awarded the sentence of the lash. As to reformation, has anyone ever yet been reformed by the punishment of the lash? I have never yet been able to discover any such evidence. Is it the wisest course for weaning men from brutality to commence the course of punishment by treatment which involves moral humiliation and physical torture? You may depend upon it with most of them there are latent but still present sparks of self-respect and an element of human dignity which, if carefully watched and tended, might in the course of time burn into a purifying glow, which would be in great danger of extinction by such measures as this Bill proposes. As to the deterrent effect of flogging, it is impossible to look upon a punishment as really deterrent if the question

whether it will be inflicted in any particular case is no more a certainty than a chance in a lottery. The majority of the judges never award this punishment at all."

In a debate in 1885, a similar view was held by such high authorities as Lord James, of Hereford, Sir Edward Clark, Lord Herschell, Lord Davey, and the Recorder of London and in 1900 the bill referred to was rejected by a majority of 123.

While our system of dealing with crime remains what it is it is idle to talk, as Mr. Asquith did, of possible reformation being prevented by the use of the lash. Self-respect and human dignity are not "carefully watched and tended" by the punishments commonly in use by our system of prison discipline any more than they would be by the punishment of the lash. A more reasonable view of the case would be to say that a nature of so low a type as that in question would not feel itself any further degraded by a flogging than it was before—the physical discomfort would be all that would be felt, and the pain of that would soon be over.

More important for us to consider is whether, as a deterrent from crime, the use of the lash has been effective. On this point it is strongly urged by the *Law Times* of April 12th, that such has not been the case—that robbery by violence has not been diminished in places where punishment by flogging has been freely resorted to. An instance is given at Liverpool where in 1882 there were fifty-six of such cases and in 1893 at the end of eleven years during which the judge had administered 1900 lashes the number of cases had risen to seventy-nine. Similar experience is recorded at Leeds.

In this connection the remarks of Lord Chancellor Herschell may be quoted:—"He strongly objected to the punishment of flogging for two reasons. The first was that it was perhaps above all other punishments an unequal punishment. They inflicted the same number of strokes upon two men, and the chances were that the man who deserved to feel the punishment most felt it by far the least. It was an extremely unequal punishment. And in the next place it was of all punishments the

most uncertain. They had to leave the punishment, as they must leave it, to the discretion of the judge. There were some judges who would always flog, there were some judges who would never flog. Whether the punishment was inflicted or not depended, not on the gravity of the offence, but upon the particular judge who might chance to go that particular circuit. He knew it was the prevailing opinion that the punishment acted as a great deterrent in cases of crimes of violence—that it put down garrotting. He invited anyone who entertained that belief to be good enough to peruse a return which was laid on the table of the House at his instance, because by that return it was shewn very clearly that garrotting had been put down before the Flogging Act was passed. If hon. members would read the return to which he alluded they would find that if a judge went assize and flogged a number of men for a particular offence the number of such offences at the next assize did not diminish.”

We make these quotations, but it may be that there is evidence on the other side which has not come before us. The subject is an interesting and important one, as is everything connected with the administration of justice, and we should like to have some evidence as to the effect of the punishment where it has been applied in this country. We are far from having reached a method of dealing with criminals which commends itself to reason or humanity. How many criminals whom we punish have we made hardened criminals by our manner of dealing with first offenders? How many have we reformed, and how many have we given a chance of reforming themselves after the courts have done with them? These are questions which perhaps our legislators will deal with when they become weary of the interesting personal issues which now take up so much of their time and attention.

CRIMINAL APPEALS IN ENGLAND.

The Court of Criminal Appeal in England established under the Criminal Appeal Act, 1907, sat for the first time in the latter end of last month. As our readers will remember the

propriety of allowing appeals in criminal cases was fully discussed for some time before the Act was passed. It was strongly opposed by Lord Chief Justice Alverstone, whose views on the subject we published at length on a previous occasion (vol. 42, p. 582).

The first court was composed of the Lord Chief Justice, Mr. Justice Channell and Mr. Justice A. T. Lawrence. The *Law Times*, in referring to the matter in a recent issue, says: "From the way in which the cases that came before this court were dealt with, it is clear that, although the court intends to administer this new branch of our judicial procedure in the spirit which the legislature intended, at the same time it does not mean to open the door to those abuses which are so often to be found in some countries where criminal appeals exist."

It is well that the Chief Justice, holding the views he so forcibly expressed, was a member of the court at the beginning of its history, so that the dangers which he feared should as far as possible be minimized. The first list for disposal by the court consisted of seven applications, some of which were for leave to appeal and some were appeals. Of these seven cases, leave to appeal was given in one, and in two of them the convictions were quashed.

Our contemporary after referring to these cases and their treatment, concludes with the following pertinent observations: "To our mind, the first work of this tribunal amply justifies its existence, and it is undoubtedly better that cases of alleged miscarriage of justice should be investigated in open court rather than by the informal procedure of the Home Office, though, of course, the powers of the Crown exercised through the Home Secretary are in no way interfered with. We have very little doubt that there will be a considerable increase in the work of the Court of Criminal Appeal, and an increase in the number of judges of the King's Bench will become necessary; but, as we have stated, although the tribunal gives indication that it intends to administer loyally the new procedure, it does not intend to allow criminal appeal to become a by-word

in the country. Findings of juries on proper evidence are to be respected, and only when it is clearly shewn that there is a real miscarriage of justice will they be interfered with. Of course, time alone will shew whether the new court proves as successful as its supporters have stated it will be, but from the indications given by its first work we do not think that they will be disappointed."

JUVENILE DELINQUENTS ACT.

There is at present before the Dominion Senate a measure known as the Juvenile Delinquents Act, which provides machinery for the more complete separation of young persons under sixteen from the ordinary criminal procedure of the country. It aims at establishing detention homes apart from the jail, separate officials without uniform, and a separate court for children, so that anything that would tend to fasten the criminal stigma upon the child would be entirely removed. It is said that in the past many young people have been put into prison when more humane efforts would have resulted in their restoration to good society. Many boys receive their first lessons in crime in the jails and lock-ups, while awaiting trial, and are led by a certain spirit of bravado to regard a criminal career as heroic. The proposed measure desires to do away with such a tendency by bringing the lad under an educational system that would seek to touch his heart and influence him for a life of self-respecting citizenship.

An important feature of the bill is known as probation. Heretofore, a boy was either discharged, convicted and allowed out on suspended sentence, or sent to a reformatory. Under the proposed system he is placed under the oversight or guardianship of a probation officer, who, while attached to the court in an official capacity, is not a police officer, but is often a lady intimately associated with the city charities or missions. This probation officer immediately takes charge of the case without removing the child from its home; visits the parents, the school

or place of employment, and ascertains all about his companionships, and endeavours to influence for good all his friends and relatives, so that his energies may be directed along right and worthy lines, rather than in antagonism to law and order. This system has been tried in other countries, and in our own province of Ontario, for fifteen years past with great success. It claims to be the simplest and most effectual means of permanently benefiting the child, the family and the community.

We publish in another place a summary of the Act introduced last week in the British House of Commons by Mr. Gladstone, with the same aim in view as that now before our Dominion legislature, viz., the prevention of crime. These two bills mark a step, we trust in advance, in this most important subject.

PREVENTION OF CRIME.

The measure introduced last week into the House of Commons by Mr. Gladstone, which is described as a Bill to make better provision for the prevention of crime, and for that purpose to provide for the reformation of young offenders and the prolonged detention of habitual criminals, is a great advance in the rational treatment of crime, and is undoubtedly based upon sound principles.

Part I. of the Bill relates to the reformation of young offenders, and power is given to the court, where a person not less than sixteen nor more than twenty-one years of age is convicted on indictment of an offence for which he is liable to be sentenced to penal servitude or imprisonment, to pass a sentence of detention under penal discipline in a Borstal institution for a term of not less than one year nor more than three years. The court has to be satisfied also that by reason of his antecedents or mode of life it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime.

Where a court passes such a sentence, it is also to pass, as an alternative, such sentence of penal servitude or imprison-

ment as the court would otherwise have passed, and, if it appears to the Secretary of State, on the report of the Prison Commissioners, that, owing to the character, state of health, or mental condition of the offender, it is not advisable to send the offender to a Borstal institution, the Secretary of State may order that the offender undergo such alternative sentence, but, apart from such order, the sentence of detention in the institution shall take effect. All these provisions may be extended by the order of the Secretary of State to persons apparently under such age as may be specified in the order, and to persons summarily convicted of an indictable offence; but we do not quite see why this large extension of the provisions of the Bill should be left to the discretion of a Government department, and it is to be hoped that all offenders, whether convicted on indictment or summarily, who are apparently between the years of sixteen and twenty-one will be brought within its provisions. Power is to be given to the Secretary of State to transfer a person from prison to a Borstal institution, and, as a necessary corollary of the Bill, clause 3 provides for the establishment of Borstal institutions and for making regulations for their rule and management. Clause 4 gives power to the Prison Commissioners, subject to regulations by the Secretary of State, at any time after the expiration of six months from the commencement of the term of detention, if satisfied that there is a reasonable probability that the offender will abstain from crime and lead a useful and industrious life, by license to permit him to be discharged from the Borstal institution on condition that he be placed under the supervision or authority of any society or person named in the license who may be willing to take charge of the case. Where a person detained in a Borstal institution proves to be incorrigible, or to be exercising a bad influence on the other inmates, the Secretary of State may transfer such person to prison, and power is given to remove a person sentenced to detention from one part of the United Kingdom to another.

These are the chief provisions of the Bill with regard to the reformation of young offenders, and it will be seen that a strong

effort is made to separate them from the contaminating influence of prison, while, at the same time, the fullest opportunity will be afforded them, owing to the "license" provisions, of starting life afresh in a respectable way.

The detention of habitual criminals is the subject-matter of Part II. of the Bill, and power is given, where a person is convicted on indictment of a crime and subsequently the offender admits or is found by the jury to be an habitual criminal and the court passes a sentence of penal servitude, if of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, the court may pass a further sentence ordering that on the determination of the sentence of penal servitude the offender be detained during His Majesty's pleasure, such detention being called "preventive detention."

In order that a person be found an habitual criminal, the jury must be satisfied that he has been three times previously convicted of a crime, and that at the time when he committed the crime for which he is to be sentenced he was leading persistently a dishonest or criminal life. The word "crime," with reference to this subject-matter, is to mean any felony, coining offence, obtaining goods or money by false pretences, conspiracy to defraud, and any misdemeanour under section 58 of the Larceny Act, 1861. The accused person is only to be put on his trial as an habitual criminal after pleading guilty to, or conviction for, the crime with which he is charged, and a charge of being an habitual criminal is not to be inserted in an indictment without the consent of the Director of Public Prosecutions, and unless seven days' notice has been given that it is intended to insert such charge. It is also provided that a person sentenced to preventive detention may, notwithstanding anything in the Criminal Appeal Act, 1907, appeal against the sentence without the leave of the Court of Criminal Appeal.

Perhaps one of the most important clauses of this measure, and one that will require very careful consideration, is clause

11, which deals with the power to discharge on license persons sentenced to preventive detention, for naturally it is hoped that the changes brought about by the Bill may be reformatory as well as preventive, and, therefore, it will be necessary that ample scope should be afforded of considering the conduct, and progress of reformation if such occurs, of habitual criminals undergoing sentences of preventive detention. The Secretary of State, once at least in every three years, is to consider whether the person detained shall be released on license, and the directors of convict prisons are to report periodically to him on the conduct and industry of the persons detained, and for this purpose are to be assisted by a committee at each prison consisting of the governor and members of the board of visitors, such committee to hold meetings at least every six months. If the Secretary of State is satisfied that there is a reasonable probability that the person detained will abstain from crime and lead a useful and industrious life, or that he is no longer capable of engaging in crime, he may by license permit the person detained to be discharged from prison on probation and on condition that he be placed under the supervision or authority of any society or person named in the license. Clause 12 embodies the provisions as to persons so placed out on license, and, if this measure passes into law, it is clear that any relapse of an habitual criminal into a life of crime will result in a more or less permanent detention.

Everybody who has had any experience of crime and criminals will, we feel sure, cordially approve the principles of this measure. It aims to stop the criminal at his earliest stages, and to try to bring him back to an honest mode of living so that he may become a respectable citizen, while, at the same time, it is hoped to free society of those persons who are apparently beyond reclamation, although opportunity is to be given to them to show that they desire to leave that course of life which they have mainly followed throughout their existence.—
Law Times.

In reference to the recent legislation providing for the election of Benchers in Ontario it should be noted that the suggestion which emanated from this journal in 1901 was followed in 1906 by a motion introduced in Convocation by a Bencher of the Law Society of Upper Canada (Mr. H. H. Strathy, K.C.) to have the suggested change in the mode of election discussed by a Committee of the Bench. In consequence of the action of that Committee, subsequently endorsed by the unanimous vote of Convocation, the matter was brought by the Society to the notice of the Attorney-General. The Benchers are therefore entitled to the credit of bringing the matter to a practical issue, resulting in the much needed change being effected.

It would appear, to use a slang expression, appropriate to the wild and woolly west, that "there are not enough judges to go round" in the province of British Columbia. A protest was made at the opening of the Supreme Court in that province this month against the delays caused by the want of a sufficient number of judges. It is said that as a result many of the cases had to go over as a number of the appeals were from the decisions of judges then on the Bench; the other judges being absent on duty elsewhere. We scarcely appreciate, perhaps, that Canada is a country of magnificent distances, and that much time is lost, especially in our Pacific province, by the necessities of travel.

It is not quite clear from the report given in the daily press exactly the view held by the Minister of Justice as to the right of or discretion as to disallowance of Provincial Acts given to the Dominion Government by the British North America Act. The mere fact of a matter being within the purview of the provincial legislature is not surely a sufficient reason for not exercising the right should the case seem to require intervention. The subject is one of great importance and worthy of discussion.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

PRACTICE—COSTS—SOLICITOR—TAXATION OF COSTS AFTER PAYMENT—THIRD PARTY LIABLE TO PAY—SPECIAL CIRCUMSTANCES.

In re Hirst (1908) 1 K.B. 982. A third party liable to pay a solicitor's bill of costs made application for taxation thereof after payment. The circumstances were as follows. A Miss Elsworth had begun an action against the executors of one Fox to recover moneys alleged to be due from his estate under a deed. The action was compromised, the executors agreeing to pay the plaintiff's costs both of and prior to the action, out of the estate and the action was to be stayed. The plaintiff paid her solicitors their costs and claimed payment thereof out of the estate as agreed. The executors thereupon applied for taxation under the Solicitors Act as being third parties liable to pay. The Master refused the order, and his order was affirmed by Ridley; but the Court of Appeal (Williams, Farwell and Kennedy, L.JJ.) reversed his decision, and held that the order should be granted, and held that the "special circumstances" justifying taxation after payment, are not confined to pressure, overcharge or fraud, but include any circumstances of an exceptional nature which a judge in the exercise of a judicial discretion may consider will justify such taxation. In the present case before payment of the bill the solicitors for the executors had expressly required to have the costs taxed, but the plaintiff, without acceding to that request, had paid her solicitors' bill without taxation. The fact that it would be necessary for the taxing officer to construe the agreement for payment of the costs in order to determine what particular costs were payable thereunder was also held to be no obstacle to the granting of the order.

PRACTICE—ORDER—INTERLOCUTORY—FINAL.

In re Marchant (1908) 1 K.B. 998 may be briefly noted for the fact that the Court of Appeal (Williams and Farwell, L.JJ.) decided that an order made on a summary application to enforce a solicitor's undertaking, and whereby the solicitor was ordered to pay a sum of money, was a final and not a merely interlocutory order.

MAINTENANCE OF ACTION—COMMON INTEREST—TRADE RIVALS—
PROTECTION OF CUSTOMERS—INDEMNITY.

In *British Cash & P.C. v. Lamson Store Co.* (1908) 1 K.B. 1006 the defendants were rivals of the plaintiffs in trade and had obtained contracts of hire for their goods from three of the plaintiffs' customers, and they agreed to indemnify these customers against any claims of the plaintiffs against them for breach of contract. Two of these customers were originally customers of the defendants and the third had given an order to the plaintiffs in the belief that he was dealing with the defendants. The plaintiffs sued each of the customers for breach of contract, and in two instances recovered damages and costs, which the defendants paid under their contract of indemnity. The plaintiffs then sued the defendants, claiming damages on the ground that they had been guilty of maintenance. Ridley, J., who tried the action, gave judgment in favour of the plaintiffs for nominal damages and awarded an injunction restraining the defendants "from unlawfully upholding or maintaining actions, suits or other legal proceedings between the plaintiffs and any other person or persons"; but on appeal to the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) the judgment of Ridley, J., was reversed and the action dismissed on the ground that the acts complained of did not amount to maintenance, and that on the contrary the defendants had a common interest with the customers in question. Cozens-Hardy, M.R., adopts the language of Lord Abinger in *Findon v. Parker*, 11 M. & W. 675: "The law of maintenance, as I understand it, upon the modern constructions is confined to cases where a man improperly, and for the purposes of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make," but that does not in his opinion preclude the making of contracts of indemnity in proper cases, even though it may involve and, indeed, contemplate the institution of an action against the person indemnified.

PRACTICE—DISCOVERY—SHIP'S PAPERS—FIRE INSURANCE.

In *Tannebaum v. Heath* (1908) 1 K.B. 1032 the plaintiffs sued on a policy of fire insurance to recover the value of goods. The policy covered loss in transitu by sea, but the loss had in fact taken place in a store on land. Bigham, J., assuming that the action was an ordinary policy of marine insurance made an order

for discovery of ship's papers, but this, on appeal, was set aside, the court holding that the discovery of ship's papers was peculiar to actions for losses at sea, and not to be extended to actions where, as in this case, the loss had taken place on land.

PRACTICE—SERVICE OF DEFENDANT OUT OF JURISDICTION—RULE 64
—(ONT. RULE 162 (g)).

The Hagen (1908) P. 189 deserves a passing notice. The action was in the Admiralty Division to recover damages against a German shipowner for a collision which took place in the Elbe. The plaintiffs' ship, which was British, when coming down the Elbe came into collision with another British ship, which in turn came into collision with a German ship. The agents of the plaintiffs' and the German ship exchanged letters of guarantee, but the owners of the German ship did not commence any action in Germany against the two British ships. The plaintiffs commenced the present action in personam against the owners of the other British ship and the owners of the German vessel and obtained leave to serve the latter out of the jurisdiction. The owners of the German vessel applied to discharge the order. Deane, J., refused the application, but the Court of Appeal (Lord Alverstone, C.J., and Farwell and Kennedy, L.J.J.) reversed his decision. The Court of Appeal admitted that the German owners were necessary or proper parties to the action and therefore *prima facie* within the rule; but it appearing that an action by the German owners was pending when this application was made in a German court in respect of the collision, that it was not a proper exercise of discretion to allow them to be served as defendants in the present action.

COMPANY—DEBENTURE—FLOATING SECURITY—SUBSEQUENT ISSUE
OF DEBENTURES—SPECIFIC CHARGE—PRIORITY—DEBENTURES
BANKING PARI PASSU—ORDINARY COURSE OF BUSINESS.

Cox Moore v. Peruvian Corporation (1908) 1 Ch. 604. This was an action by a debenture holder of a company to restrain the company from issuing a further series of debentures in such a way as to give them priority over that held by the plaintiff. The company had very extensive powers, and was not, as Warrington, J., found, a strictly trading corporation. It had power to issue debentures to the amount of £6,000,000. It did issue debentures to the amount of £3,700,000. These debentures were

headed "first mortgage debenture," and by them the company purported to create a floating charge on all its property, but this was not to interfere (until default in payment of principal and interest and steps taken to enforce payment) with the company dealing with its property. By condition on the debenture it was stated to be "one of an issue of like debentures for the aggregate sum of £———, part of the said authorized issue of £6,000,000—the whole of which debentures of such authorized issue are intended to rank *pari passu* as a first charge on all the company's property," and the company reserved the right to issue the balance. There was also a condition providing for meetings of debenture holders and enabling them to consent to the issue of other securities to rank prior to, or *pari passu* with, the £6,000,000 of debentures. The company proposed to issue £2,000,000 more debentures, part of the £6,000,000, to be secured by a fixed and specific charge upon specific assets of the company without any floating charge. The proposal had not been submitted to any meeting of debenture holders. The plaintiff, who was a debenture holder of the £3,700,000 series, moved for an interim injunction to restrain the issue of the proposed debentures upon the security proposed as being an undue interference with his rights. Warrington, J., refused the motion, holding that the creation of a floating charge in favour of the first issue of debentures did not prevent the company from giving a specific charge on specific assets in favour of the debentures now sought to be issued. He held that the condition as to the meeting of debenture holders, etc., did not apply to issues of any part of the £6,000,000, but was a provision to enable the company with the consent of the debenture holders to increase the debenture debt over the £6,000,000.

FIXTURES—RIGHT OF REMOVAL—TAPESTRIES—GENERAL SCHEME OF DECORATION—DEVISE OF HOUSE—REQUEST OF CHATTELS.

In *Re Whaley, Whaley v. Roehrich* (1908) 1 Ch. 615 the question is again raised whether tapestries and a picture affixed to a wall of a dwelling house as part of the decoration of a room are to be regarded as chattels or as part of the freehold. The question, it may be remembered, was the subject of much litigation in the case of *Leigh v. Taylor* (1902) A.C. 157, where the House of Lords determined that in the circumstances of that case tapestries must be regarded as chattels. In the present instance a different conclusion has been reached. The circum-

stances of this case were that the tapestries and picture in question had been originally purchased by a testator as part of the house—they were kept in place by oak mouldings, and the picture (a portrait of Queen Elizabeth) painted on wood, was fixed to the wall over the mantel piece by the moulding of an over mantel. The testator devised the house to one person and his chattels to another, and each claimed the tapestries and picture. Neville, J., held that they were affixed to the freehold and passed with the house.

EASEMENT—PARTY WALL—DAMAGE BY SMOKE.

Jones v. Pritchard (1908) 1 Ch. 630. In this case the plaintiff and defendant each owned one-half of a party wall between their respective dwellings; on either side of this wall were fire places and chimney flues for their respective houses. By reason of the subsidence of the defendant's house, but for which it was not shewn that he was in any way responsible, the wall became defective and the smoke from the defendant's chimney found its way into the plaintiff's house and created damage, and thereupon the plaintiff brought the present action, claiming an injunction. Parker, J., who tried the action held that the plaintiff was not entitled to the relief claimed, and that the defendant was not liable for any nuisance occasioned by his using the party wall for the purposes intended and without negligence.

**LANDLORD AND TENANT—FIXTURES—COVENANT TO DELIVER UP
DEMISED PREMISES WITH FIXTURES—SURRENDER—CREATION
OF NEW TENANCY.**

In *Leschellas v. Woolf* (1908) 1 Ch. 641 several questions relating to the law of landlord and tenant are determined. In 1851 a lease of houses was made for the term of 70 years, it contained a covenant by the lessee at the expiration or determination of the term to deliver up the demised premises "with all and singular the fixtures and articles belonging thereto." In 1907 Abrahams was the lessee for the unexpired term, but the premises were then sub-let to Woolf, who used them as a lodging house. In June, 1907, Abrahams was notified to repair, and he then made an offer to surrender the premises at once and pay £100 towards the repairs, which offer was accepted by the lessor. Woolf, who had certain tenant's fixtures on the premises, was not a party to this agreement, but was aware of what was going

on, but the lessors did not know of his sub-tenancy until July, 1907. The lessors and Abrahams wished to get rid of the sub-tenancy, and early in August Abrahams gave Woolf notice to quit on August 19, and subsequently the lessors on the 7 August made an agreement in writing with Woolf whereby he became the weekly tenant of the lessors as from August 12, but there was no agreement as to Woolf's fixtures. On August 19 Abrahams executed a deed of surrender, but dated August 6 (so as to make the surrender precede the date of the agreement between the lessors and Woolf). On September 12, 1907, the lessors gave Woolf notice to quit on September 23. Woolf on quitting removed some of his trade fixtures and claimed to remove others, and the present action was brought by the lessors, claiming an injunction and damages. Parker, J., who tried the action, came to the conclusion that the defendant was precluded by what had taken place from removing the fixtures, that if not bound by Abrahams' agreement to surrender, yet his agreement of August 7 had the effect of surrendering his tenancy under Abrahams, and by accepting a new tenancy under the plaintiffs without making any stipulations for the removal of the fixtures he had lost his right to remove them.

LANDLORD AND TENANT—QUIET ENJOYMENT—DEROGATION FROM GRANT—IMPLIED CONTRACT—AGREEMENT "TO LET"—DISTURBANCE INDUCED BY LANDLORD.

Markham v. Paget (1908) 1 Ch. 697 was an action by a tenant against his landlord for breach of an implied covenant for quiet enjoyment. The demised premises consisted of a residence and grounds beneath which was a bed of coal, which was excepted and reserved. The landlord was equitable tenant for life of the premises and was also one of several trustees of the fee, including the minerals, which had been also leased to demising trustees, who had leased them to a company. This company covenanted to indemnify the lessors against damage caused by their working and to indemnify the lessors against actions in respect of damage arising from the exercise of their powers. The mining lease empowered the lessees to let down the surface, but there was a provision that in case serious damage by subsidence was reasonably anticipated, the company might, without paying for the same, leave sufficient coal, as might be agreed upon by the lessors, for support. Serious damage being anticipated to the residence leased to the plaintiff by working of the coal, the

defendant induced the "demising trustees" to refuse to agree to any coal being left for support. The coal was therefore worked, subsidence took place, and the plaintiff's residence was damaged. The plaintiff claimed damages on the ground that the defendant by inducing the trustees to refuse their consent to leaving proper support had derogated from her grant, and also committed a breach of her covenant for quiet enjoyment which was implied by the word "let," and Eady, J., held that the plaintiff was entitled to succeed on both grounds. The defendant claimed relief over against the company by third party notice on their agreement to indemnify, but the court held that that agreement did not extend to liabilities created by the act of the defendant herself.

CHARITY—BEQUEST TO CHARITY ORGANIZATION—SOCIETY IN TRUST FOR "SUCH OTHER SOCIETY OF SOCIETIES AS SHALL IN THE OPINION OF THE GOVERNING BODY BE MOST IN NEED OF HELP"—EJUSDEM GENERIS.

In re Freeman, Shilton v. Freeman (1908) 1 Ch. 720. A testator had bequeathed the residue of his estate to the Charity Organization Society in trust to invest, and out of the annual income retain one-tenth for the purposes of that society, and divide and pay the residue "to such other society or societies as shall in the opinion of the governing body of the Charity Organization Society be most in need of help, besides fulfilling the standard of good management, efficiency and economy of such Charity Organization Society." The question for decision was whether the disposition of the nine-tenths of the income was a valid bequest to charity. The "ejusdem generis" rule was invoked in support of the bequest and it was contended that it was in effect a bequest to similar organizations to that of the Charity Organization Society itself, but the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) agreed with Joyce, J., that in the circumstances of this case the ejusdem generis rule was inapplicable and would not carry out the real intention of the testator, and that the bequest as to the nine-tenths was therefore void for uncertainty and passed to the next of kin.

INFANT — NECESSARIES — ACTUAL REQUIREMENTS — EVIDENCE — ONUS OF PROOF—SALE OF GOODS ACT, 1893—(56 & 57 VICT. c. 71), s. 2.

Nash v. Inman (1908) 2 K.B. 1 was an action brought by a tailor against an infant to recover £122 19s. 6d. for clothes fur-

nished to the defendant. The garments supplied included eleven fancy waistcoats at two guineas a piece. The father of the defendant proved that he was under age, that he was a student at Cambridge and had been supplied with a sufficient wardrobe. There was no evidence given to the contrary, and Ridley, J., who tried the action, held that there was no evidence to go to the jury and dismissed the action. The plaintiff moved for a new trial on the ground that the judge himself had decided the issues of fact himself and that he should have left them to the jury; but the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.J.J.) affirmed the decision, holding that under the Sale of Goods Act, s. 2, it is not only necessary to shew in such a case that the goods sold were necessaries, but that the infant actually required them. That section defines "necessaries" to mean goods suitable to the condition of life of the infant and to his actual requirements at the time of the sale and delivery, and this, as Moulton, L.J., points out, was the effect of the decisions prior to the Act of 1893, and the case would therefore appear to be good law in Ontario.

NUISANCE—CREOSOTE USED IN PAVING ROAD—INJURY TO VEGETATION FROM FUMES OF CREOSOTE—STATUTORY AUTHORITY.

West v. Bristol Tramways Co. (1908) 2 K.B. 14 was an action brought to recover damages for nuisance occasioned by the defendants using blocks coated with creosote for paving a roadway. The defendants were empowered by statute to pave the roadway with wooden blocks, but there was no express authority to use creosote. The blocks used by the defendants were steeped in creosote and the fumes therefrom injured the plaintiff's plants growing in his garden near the highway. Phillimore, J., who tried the action, gave judgment for the plaintiff, and the Court of Appeal (Lord Alverstone, C.J., and Barnes, P.P.D., and Farwell, L.J.) affirmed his decision, holding that the case was within the principle laid down in *Fletcher v. Rylands* (1868) L.R. 3 H.L. 330, and that the statutory power to pave the road with wood gave the defendants no power to create a nuisance.

 REPORTS AND NOTES OF CASES.

 Dominion of Canada.

 SUPREME COURT.

Exch.] THE KING v. ARMSTRONG. [May 5.
Negligence of fellow-servant—Operation of railway—Defective switch—Public work—Tort—Liability of Crown—Right of action—Exchequer Court Act, s. 16 (c)—Lord Campbell's Act—Art. 1056 C.C.

In consequence of a broken switch, at a siding on the Intercolonial Railway (a public work of Canada), failing to work properly although the moving of the crank by the pointsman had the effect of changing the signal so as to indicate that the line was properly set for an approaching train, an accident occurred by which the locomotive engine was wrecked and the engine-driver killed. In an action to recover damages from the Crown, under article 1056 of the Civil Code of Lower Canada,

Held, affirming the judgment appealed from that there was such negligence on the part of the officers and servants of the Crown as rendered it liable in an action in tort; that the Exchequer Court Act, 50 & 51 Vict. c. 16, s. 16 (c), imposed liability upon the Crown in such a case, and gave jurisdiction to the Exchequer Court of Canada to entertain the claim for damages, and that the defence that deceased, having obtained satisfaction or indemnity within the meaning of article 1056 of the Civil Code, by reason of the annual contribution made by the Railway Department towards the Intercolonial Railway Employees' Relief and Insurance Association, of which deceased was a member, was not an answer to the action. *Miller v. Grand Trunk Ry. Co.* (1906) A.C. 187, followed. Appeal dismissed with costs.

Newcombe, K.C., for appellant. *R. C. Smith*, K.C. and *W. G. Mitchell*, for respondent.

B.C.] MARKS v. MARKS. [May 5.
Will—Construction—Description of legatee—Devise "to my wife"—Bigamous marriage—Evidence—Burden of proof.

A devise made in a will "to my wife" was claimed by two women, with both of whom the testator had lived in the relationship of husband and wife.

Held, per IDINGTON, J.—That even if the first marriage was assumed to have been validly performed, all the surrounding circumstances shewed that, by the words “to my wife,” the testator intended to indicate the woman with whom he was living, in that relationship, at the time of the execution of the will and thereafter up to the time of his death.

Held, per DUFF, J.—That the woman who claimed to have been first married to the testator had not sufficiently proved that fact, and that the other woman, who was living with the testator as his wife at the time of the execution of the will and up to the time of his death, was entitled to the devise.

Held, per DAVIES and MACLENNAN, JJ., dissenting.—That the first marriage was sufficiently proved and, consequently, that the devise went to the only person who was the legal wife of the testator.

FITZPATRICK, C.J., was of opinion that the appeal should be dismissed.

Judgment appealed from (13 B.C. 161) affirmed, DAVIES and MACLENNAN, JJ., dissenting. Appeal dismissed with costs.

Cassidy, K.C., for appellant. *Travers Lewis*, K.C., for respondent.

Ont.]

WABASH RY. CO. v. MCKAY.

[May 5.

Railway—Collision—Stop at crossing—Statutory rule—Company's rule—Contributory negligence.

A train of the Wabash Railroad Co. and one of the Canadian Pacific Ry. Co. approaching a level crossing at obtuse angles. At each track was a distance semaphore between 800 and 900 feet from the crossing and on the C.P.R. track a “stop post” half way between said semaphore and the crossing, where a rule of the company required trains to stop. The Wabash train did not come to a “full stop” before reaching the crossing and the other did at the distance semaphore, but made no further stop at the “stop post.” The trains collided at the crossing and the C.P.R. engineer was killed. In an action by his widow,

Held, that the failure of the engineer of the C.P.R. to stop the second time was not contributory negligence, and the Wabash Co. being admittedly guilty of negligence in not complying with the statutory rule (R.S. (1906) c. 37, s. 278), the widow was entitled to recover. Appeal dismissed with costs.

Rose, for appellants. *Robinette*, K.C. and *Godfrey*, for respondent.

N.S.] AINSLIE MINING CO. v. McDougall. [May 14.
Appeal—Alternative relief—Appeal for larger relief than granted.

The unsuccessful party at the trial of an action moved the court of last resort for the province for judgment or, in the alternative, a new trial, and obtained the latter relief.

Held, that he could not appeal to the Supreme Court of Canada from the order for a new trial with a view to obtaining a judgment in his favour. Appeal quashed without costs.

Mellish, K.C., for appellants. *Daniel McNeill*, for respondent.

N.S.] EAD v. THE KING. [May 18.
Appeal—Criminal law—Reserved case—Application “during trial.”

By s. 1014 (3) of the Criminal Code, either party may “during the trial” of a prisoner on indictment apply to the court to have a question which has arisen reserved for the consideration of the Court of Appeal.

Held, that for the purposes of this provision the trial ends with the verdict after which no such application can be made. Appeal dismissed.

W. F. O'Connor, for appellant. *A. C. Morrison*, K.C., for respondent.

Province of Ontario.

SURROGATE COURT OF THE COUNTY OF YORK.

IN RE SHAMBROOK ESTATE

Succession Duties Act—Insurance money—Aggregate value.

The deceased had an insurance on his life, the policy being made payable in his lifetime to his wife and the amount was after his death paid to her.

Held, that the amount so paid formed part of the aggregate value of the estate for the purpose affixing the amount of succession duty, although itself exempt from duty.

[TORONTO, June 2—Winchester, Surr. J.]

This was a matter of enquiry directed by the Provincial Treasurer under s. 8 of the Succession Duties Act, with reference to the value of the estate of the deceased.

Geary, K.C., for the solicitor for the Treasury. *Ballantyne*, for the widow. *Cavell*, for the brothers and sisters of deceased.

WINCHESTER, SURR. J.:—The real question in dispute is as to an insurance on the life of the deceased for \$2,000, the policy being made payable in the deceased's lifetime to his wife, and the amount of which has since been paid to the widow.

It is claimed by the solicitor for the treasury that this sum should be added to the value of the estate in ascertaining the aggregate value of the estate, although exempt from duty under the statute, the sum being less than \$5,000, as provided by s. 5, s.-s. 4, of the Act.

For the widow and the others interested in the estate it is claimed that it should not be so taken into account, that it never formed part of the estate, was not property of the deceased, and did not pass on the death of the deceased under the statute.

The sections of the statute involved in the contention of the parties are s. 3, s.-s. (a), (b), (g), (h); s. 4; s. 5, s.-s. 4; s. 6 (f) and s.-s. 2 (b).

Sec. 3 (b) interprets the word "property" as including the real and personal property of every description, and every estate and interest therein capable of being devised or bequeathed by will, or of passing on the death of the owner to his heirs or personal representatives. Sec. 3 (a), explains the meaning of the words "passing on the death." Sec. 6 (f) refers to the property that shall be subject to succession duty as being inter alia money received under a policy of insurance effected by any person on his life where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or the part of such money in proportion to the premiums paid by him where the policy is partially kept up by him for such benefit. And s.-s. 2 (b) of the same section provides as follows: "Any property within the meaning of clauses (b) to (h) inclusive shall for all purposes of this Act be deemed to pass on the death of deceased."

We have it therefore declared by these sections that money received under a policy of insurance (effected as in the present case) is to be deemed as passing on the death of the deceased, and liable to succession duty unless otherwise exempted.

Sec. 3 (g) provides that the words "aggregate value" mean the value of the property after the debts, encumbrances and other allowances authorized by s. 4 of this Act are deducted therefrom, and for the purpose of determining the aggregate value and the rate of duty payable, the value of property situ-

ated out of Ontario shall be included. No allowance as to insurance money is referred to in s. 4 of the Act so that the exemption provided by s. 5 is not to be deducted as directed by s. 3 (g).

Sec. 5, s.-s. 4, provides that no duty shall be leviable on any moneys received under a contract for insurance effected by any person on his life payable to any of the persons mentioned in s.-s. 3 of this section when the aggregate of such insurance or insurances does not exceed \$5,000; but, as stated above, this is not to be considered as a deduction under s. 3 (g).

It was held by Falconbridge, C.J.K.B., and affirmed in appeal by the Court of Appeal, *Attorney-General v. Lee*, 9 O.L.R. 9, and 10 O.L.R. 79, that in ascertaining the aggregate value of property the amount of a mortgage against real estate could not be taken from the value of the property under the law as then existing, which provided that the aggregate value meant the value of the property before any debts or other allowances or exemptions were deducted therefrom. That Act has since been amended, and therefore that case is not at present applicable to the present state of the law; but it shews that although certain property would be exempt from the duty, yet it should be considered in ascertaining the aggregate value of the estate for the purpose of the Succession Duties Act. I refer to s. 3, s.-s. 2, and s. 3 of 1 Edw. VII. c. 8.

I am therefore of opinion that in ascertaining the aggregate value of the estate it is proper to include the moneys received under the insurance policy effected by the intestate as in this case, notwithstanding that the sum subsequently becomes exempt from duty.

It is, however, contended that insurance money is not "property" as defined by s. 3 (b) and that it cannot be considered as "passing on the death of the owner" under that section as the deceased could not be the owner of the insurance money under the provisions of the policy. If s. 3 (b) were the only enactment respecting insurance moneys I am inclined to think that this contention would be correct, but s. 6, s.-s. 2 (b) expressly provides that such moneys shall for all purposes of the Act be deemed to pass on the death of the deceased.

In *Attorney-General v. Robinson* (1901) Ir. Rep. 2 K.B. 67, it was held that moneys payable under policies of insurance were liable to estate duty under the English Finance Act of 1894, s. 2, s.-s. 1 (c), as property (deemed to pass) within the meaning of the section. The sections of the Finance Act of 1894 are somewhat similar to s. 6 (f), and s. 6, s.-s. 2 (b), of the Ontario Act.

Palles, C.B., in his judgment at p. 90, said: "Upon the whole,

then, I am of opinion that the true effect of clauses (c)—which is similar to the latter clause of s. 6 (f) of our Act—and (d)—which is similar to the first clause of s. 6 (f) of our Act—taken together in relation to money received under policies of insurance effected by the deceased on his own life, is that the policy moneys, although not vested in the deceased at his death, are liable under clause (c) to duty, if the policies have been wholly kept up by him for the benefit of another; and that part of such policy moneys if so liable where the policies are partially kept up by him for such benefit. This liability arises from the fact of the policies having been kept up by the deceased, and is independent of the existence of any obligation upon him to do so, or any arrangement between him and any other person.”

I therefore hold that the “aggregate value” of the estate of the late George H. Shambrook is to include the \$2,000 of insurance money paid to his widow. This will make the aggregate value of the estate after deducting the debts, encumbrances and other allowances authorized by s. 4 of the Act, exceed the sum of \$10,000, and the estate will therefore be liable to succession duty subject to the provisions of s. 5 of the Act.

Since writing the above my attention has been called to the Insurance Act, R.S.O. 1897, c. 203, where it is provided by s. 159, inter alia, that insurance monies, such as those in question in this matter, do not form part of the estate of the assured. I hold, however, that the Insurance Act is governed by the provisions of the later—the Succession Duties Act.

COUNTY COURT OF THE COUNTY OF YORK.

REX v. AYER.

Liquor License Act—Defective information—Amendment.

At the trial before a police magistrate on Jan. 8, 1908, on an information for selling liquor on Dec. 3, 1907, to a person under the age of 21 years, it was objected that the information disclosed no offence. This was admitted and on application an amendment was allowed under s. 104 of the Liquor License Act,

Held, on appeal that s. 104 must be read with s. 95 and that no amendment could be made after 30 days from the commission of the offence.

[TORONTO, June 8—Morgan, Jr. Co. J.]

The defendant was charged that on Dec. 3, 1907, he did unlawfully sell, give, procure or did unlawfully allow or permit

liquor to be given to or furnished to one Clark Graham, an infant under the age of 21 years, without the said Clark Graham producing a requisition from a medical practitioner that such liquor was required for medicinal purposes. The trial took place at Newmarket, before the police magistrate and an associate justice on Jan. 8, 1908. It was objected on behalf of the defendant that the information disclosed no offence, as the sale was under s. 78 of the Liquor License Act, must be to a person apparently or to the knowledge of the person selling or otherwise supplying the liquor under the age of 21 years. The prosecution then applied for an amendment of the information under s. 104 of the License Act, which provides that at any time before judgment the police magistrate may amend any information. An amendment was thereupon made, and after hearing evidence a conviction was made, and a fine of \$10 and costs imposed. A similar case was tried in a similar manner against the same defendant for a sale to Thomas Hodgins with a similar result. From these convictions the defendant appealed to the judge of the County Court of the County of York.

Haverson, K.C., for the appellant, contended that the information as originally laid contained no offence, as the section did not forbid the sale to a person under the age of 21 years, but to a person apparently or to the knowledge of the person selling under that age: *Rex v. Boomer*, 15 O.L.R. 321; and that under s. 95 of the License Act all informations must be laid within 30 days after the commission of the offence and not afterwards. It was therefore too late on Jan. 8 to amend an information which did not disclose any offence.

Choppin, for the respondent submitted that the amendment could be made under s. 104.

MORGAN, JUNIOR Co. J.:—These are appeals to me against convictions under the Liquor License Act. The facts in each case are identical, and one judgment will suffice for both cases.

The defendant charged in each case, for that he did on the third day of December, 1907, at his licensed premises give, sell, or furnish liquor to Graham and Hodgins respectively, who at such time were alleged to be minors under the age of 21 years, and who did not furnish the defendant with a requisition in writing signed by a medical practitioner or justice of the peace that the liquor was required for medical purposes.

The trial under the respective informations did not come on until the 8th day of January, 1908, and at the trial objection was taken that the information did not disclose any offence under the provisions of the Liquor License Act.

The prosecution, conceding the soundness of the objection, asked leave to amend, and did amend the information by charging that the defendant on the third day of December did sell, give, furnish or allow or permit liquor to be furnished or given to the said Graham and Hodgins respectively—persons “apparently to the knowledge of defendant under the age of 21 years”—without furnishing the proper requisition of a medical practitioner.

It was objected that such amendment could not then be made, because it was practically charging a new offence, and that the time limit within which an information for the new offence so charged had expired. The amendment, however, was allowed by the justices, and defendant was convicted on both charges.

It is quite clear that at the time the information was amended the time limit had expired within which an information could have been laid for the offence charged was alleged to have taken place.

While it is quite clear that under the provisions of the Liquor License Act the information can be amended not only as to matter of form, but as to matter of substance, charging an absolutely new offence, as sought to be charged by the amendment, such amendment must be made within the time limited by the statute when an original information might have been laid charging the offence as sought to be charged by the amendment. If the time for laying such new information had not expired when the amendment was made, then the amendment might properly have been made, and defendant, if the facts were warranted, might have been convicted; and even when the amendment was made, if the scope of the amendment went only as to matter of form and detail in the information charging the same offence, but dealing with only matters of detail, then the amendment might have been made; but as the amendment charges an entirely new offence I am of opinion it could not at the time it was made be properly permitted, and no conviction could follow upon the amended information.

When the objection to the information was taken, if no amendment had been sought the prosecution should have been dismissed by the magistrates on the ground that no offence under the statute was charged. If at that time a new information

could have been laid because the date at which the offence charged in the amendment was within the time limit as provided by the statute, then the amendment might have been made. But because the effect of the amendment was in substance a new information alleging a new offence, and because the time limit had expired in which an information for such new offence could have been laid, then the amendment was improperly made, and the conviction under such amendment must fail.

The Legislature provided a time limit within which all prosecutions such as this under the Liquor License Act had to be commenced by the laying of informations, and it never could have contemplated, in the section of the Act giving leave for amendment by charging the new offence, that such new offence should be charged in an amendment after the time had expired when the substantive information could have been laid, and by such amendment destroy the protection which was given to the defendant by the clause in the statute putting the time limit upon the initiation of the prosecution.

The result of giving force to the amendment made at the time when it was made, namely, after the time limit for laying the original information had expired would be absolutely to nullify the protecting clause of the Liquor License Act and to take away from the accused that protection which the statute had deliberately thrown about him.

For these reasons I think that both convictions must be set aside with costs, which I fix at \$10 in each case. In support of the view I have taken see *Rex v. Boomer*, 15 O.L.R. 321; *Rex v. Hawthorne*, 2 Can. Cr. Cas. 468.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] McINTYRE v. GIBSON. [May 6.
Garnishment—Garnishing order before judgment in action of tort.

The plaintiff's claim against the defendant was to recover damages suffered by reason of the defendants removing part of a fence enclosing the plaintiff's crops and thereby allowing cattle to enter and damage the crops. He claimed \$600 damages.

This was an appeal from the order of DUBUC, C.J., setting aside an order of the referee, made on the application of the plaintiff before judgment, attaching money due to the defendant by a third party to answer the judgment of the plaintiff to be recovered. That order had been made under Rule 759 of the King's Bench Act, R.S.M. 1902, c. 40, upon an affidavit of plaintiff drawn up in accordance with that rule.

Held, that the words "claim or demand" used in that rule, being limited by the words "due and owing" do not extend to a claim in tort for unascertained damages, that the plaintiff must shew that he is a creditor, that a person whose claim is merely one for damages arising out of tort cannot be said to be a creditor and cannot, therefore, obtain a garnishing order before judgment. *Grant v. West*, 23 A.R. 533, followed. Appeal dismissed with costs.

Mackenzie, for plaintiff. *Burbidge*, for defendant.

Full Court.] HANNAH v. GRAHAM. [May 6.

Specific performance—Misrepresentation as to quality of land purchased—Caveat emptor—Fraud—Rescission of contract—Appeal from trial judge's findings of fact.

Appeal from judgment of MATHERS, J., noted ante, p. 287, dismissed with costs on the ground that, as the trial judge's findings both as to the alleged representations and as to their falsity were adverse to the defendant, the court could not properly interfere with them.

The majority of the court, however, expressed doubts as to whether they would have decided in the same way upon the evidence. On the legal point involved, the majority expressed no opinion, but PERDUE, J.A., expressly dissented from the trial judge's view and cited *Redgrave v. Hurd*, 20 Ch.D. 1, and *Smith v. Land, etc., Corporation*, 27 Ch.D. 7.

McLaws, for plaintiff. *O'Connor and Locke*, for defendant.

Full Court.] TRADERS BANK v. WRIGHT. [May 15.

Fraudulent conveyance—Injunction—Pleading—Evidence of fraud.

Appeal from decision of MACDONALD, J., granting an injunction restraining defendant Archibald Wright from making further transfers of his property and his co-defendant, his wife,

from transferring certain shares held by her under assignment from her husband, allowed with costs on the following grounds:

1. The statement of claim did not contain a distinct allegation that Archibald Wright was indebted to the plaintiffs, or any allegation that there was any indebtedness at the time of the transfer of any of the stock, except the Tuxedo Park Co. stock.

2. The only evidence that there was any fraud, or attempt at fraud, or conspiracy to get rid of his property, was the bare statement of Archibald Wright to the plaintiffs' Winnipeg manager, that he had no security to give when he was asked to give security for his liabilities to the plaintiffs, although at the time he first incurred the liability he had represented his financial strength at \$316,000, consisting principally of shares in several joint stock companies, the subject matters of the alleged fraudulent conveyances, and such statement could be no evidence of fraud, or indeed evidence of any nature to bind his co-defendant.

3. The statement of claim did not allege that Archibald Wright, after parting with the assets in question, had not still enough other property to meet his liabilities.

4. Although the action purported, in the style of cause, to be brought on behalf of the plaintiffs and all other creditors of Wright, there was in the body of the statement of claim no allegation of the existence of other creditors. Injunction dissolved with costs of the motion and of the appeal.

Leave to amend within fourteen days.

Mulock, K.C., and *Loftus*, for plaintiffs. *Minty*, for defendants.

KING'S BENCH.

Macdonald, J.]

[May 4.

BENNETTO v. CANADIAN PACIFIC RY. CO.

Railway company—Expropriation of land—Acceptance of amount offered by company.

Defendants, in exercise of their right to expropriate the plaintiff's land, served upon him in November, 1904, a notice offering \$6,500 for it and naming an arbitrator in case of refusal. In June following, the plaintiff accepted the offer, no proceedings having been taken by the company in the meantime. This action, brought to recover the \$6,500, was defended on the ground that, under s. 159 of the Railway Act, 1903, the plain-

tiff's acceptance of their offer should have been made within ten days, and that, in default, the only remedy he had was by arbitration as provided for by the Act.

Held, that such is not the effect of section 159, but only that, if the offer is not accepted within ten days, the company may proceed by way of arbitration, and that, as the company had taken no such proceedings before the acceptance, the plaintiff was entitled to recover.

O'Connor, and *Blackwood*, for plaintiff. *Curle*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] IN RE NARAIN SINGH. [April 29.

Constitutional law—B. N. A. Act, sec. 95—Immigration Act—Dominion and Provincial legislations—Conflict of jurisdiction.

This case was noted in respect of another matter, ante, p. 287. By s. 30 of the Dominion Immigration Act, Parliament has delegated to the Governor in Council the whole question of immigration, and that Act furnishes a complete code as to what classes of immigrants shall be admitted or excluded. The Provincial Act is inoperative in view of the Dominion legislation.

A. D. Taylor, K.C., for the Crown. *Brydone-Jack*, for the applicants.

Full Court.] FOSS v. HILL. [April 29.

Practice—Summons for directions—Order for directions also fixing place of trial—Subsequent application for change of venue—Order XXX, rr, 1, 2—Discretion.

On a summons for directions, the usual order was made, inter alia fixing the place of trial at New Westminster. There was nothing said as to venue, and no objection raised on this application. Subsequently, defendant applied to have the venue changed to Fernie on the grounds of convenience of witnesses, and the necessity for a view of the locus in quo. This application was refused.

Held, on appeal, CLEMENT, J., dissenting, that the omission of the solicitor's agent to keep open the question of venue until he was properly instructed should not in the circumstances be permitted to work an undue hardship on the defendant.

Davis, K.C., for plaintiffs, appellants. *Joseph Martin*, K.C., for defendant, respondent.

Full Court.]

[April 29.]

BRYCE v. CANADIAN PACIFIC RY. CO.

Shipping—Collision—Overtaking vessel, duty of—"Inevitable accident"—"Narrow channel."

Held, on appeal, reversing the finding of MARTIN, J., at the trial (IRVING, J., dissenting) (see ante, vol. 43, p. 589), that in this case the overtaking vessel was at fault.

Joseph Martin, K.C., and *Bowser*, K.C., for plaintiff, appellant. *Bodwell*, K.C., for defendants, respondents.

Full Court.] COURT OF CROWN CASES RESERVED. [April 29.]

Criminal law—Charge to jury—Duty of judge to explain their legal powers—Inability to withdraw right to acquit—Jury may find lesser instead of graver offence.

In his charge to the jury in a criminal trial, it is not competent for the judge to withdraw from their consideration a verdict of any lesser offence which may be included in the indictment.

Maclean, K.C. (D. A.-G.) for the Crown. *Joseph Martin*, K.C., for the prisoner.

Martin, J.] MCINNES v. B.C. ELECTRIC RY. CO. [May 21.]

Practice—Discovery, examination for—Nature of under Rules.

The omission, in the new Rules of 1906, of the amendment of June, 1900, to the old Rule 703, has not changed the practice, and an examination for discovery is still in the nature of a cross-examination.

Bloomfield, for plaintiff. *Joseph Martin*, K.C., for defendant company.

Full Court.]

[June 3.

GREEN v. WORLD PUBLISHING COMPANY.

*Libel—Verdict of jury opposed to judge's charge—New trial—
Separate allegations—One not justified.*

Two substantive allegations of wrongdoing on the part of plaintiff as a minister of the Crown having been alleged, and there being no proof of the truth, and no justification for one, of such allegations, the jury, on direction in favour of the plaintiff, brought in a verdict for the defendant.

Held, on appeal (IRVING, J., dissenting), that there should be a new trial.

Charles Wilson, K.C., and *Burns*, for plaintiff, appellant.
Macdonell and *Wintemute*, for defendant, respondent.

Flotsam and Jetsam.

In the case of *Spier v. Corll*, 33 Ohio St. 236, the statement of facts concludes as follows: "The plaintiff, by petition in error in the District Court, sought to reverse this judgment, on the ground of error in excluding the several exemplifications of record offered in evidence by him on the trial. And the three judges of the District Court, being equally divided in opinion, as it is certified, on the question of error or no error in said judgments, ordered the cause to be reserved for decision by the Supreme Court." We have been sitting up nights of late trying to figure out how those three judges could have been equally divided in opinion, but have not yet arrived at any satisfactory results.—*Law Notes*.

THE LIVING AGE, Boston, Mass.—Lovers of rare and dainty ware will find a peculiar charm in Mr. J. H. Yoxall's article "On a Platter at Montreuil," reprinted in *The Living Age* for June 13 from the *Cornhill*. No contemporary writer discourses more delightfully upon such topics than Mr. Yoxall. A striking feature for June 6 is a tribute to the late Henry Campbell-Bannerman by John Redmond, the leader of the Irish parliamentary party. The many lovers of Dickens will enjoy "Old Fleet's" study of Dickens's women characters, which is promised for June 20.

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THE CRIME OF SUICIDE.

The number of cases of suicide occurring both in Canada and the United States is simply appalling. Not a day passes without mention of some instance of a person either having ended, or tried to end, a life which seemed to be no longer worth living. Neither sex, nor age, nor any condition of life, appears to be exempt from the temptation of thus seeking to cure the ills which all flesh is heir to. Family disputes, a disappointment in love, financial difficulties, depression of spirits, ill health, worry of any kind, are all given as reasons why men and women, and even boys and girls, choose rather to face the actualities, or what they may fancy to be the possibilities of a future state, than to struggle against the often very trifling difficulties sure to be met with in our present existence.

A man quarrels with his wife—he first shoots her and then, to save further trouble, he shoots himself. There is a grave humour about this method of settling matrimonial differences that seems to be a fascination—so many instances of it do we read about. A man speculates with other people's money—loses it, becomes a defaulter, and then, sooner than face the consequences of his own acts, seeks refuge in some method of suicide. Two lovers fall out, and the man kills the woman to punish her for her want of appreciation, and then kills himself by way of expiation. Men and women of all ages and conditions, suffering from ill health, or giving way to worry of any kind, or often from no conceivable motive whatever, take their own lives without any more apparent sense of wrong-doing than they would feel in committing the most venial of offences.

The existence of this state of things is a public calamity of the most serious character, for it shews, as to the mental condition of a large class of the population, a want of moral rectitude,

a cowardice of heart, a feebleness of spirit, not only contemptible, but destructive of all those qualities which go to the making of a great and self-respecting and, especially, a Christian people. We say nothing of the religious aspect of the question, for a truly religious person would no more commit the acts which lead to suicide than he would resort to suicide to avoid the consequences of the crime.

It is, however, remarkable that such a state of things should exist where the restraints of religion are very fully exercised, and very generally regarded. It is equally surprising that it should exist in a country which is peaceful and prosperous, where poverty in its extreme form is almost non-existent—where both civil and religious liberty prevail to the fullest extent, where public opinion is very tolerant, and where even the law is not extreme to mark what is done amiss—where, in fact, as compared with many other countries, no conditions prevail which would seem to give a plausible excuse for the commission of the crime, for crime it is, of self-destruction.

From a legal aspect, how should this question be regarded? Can the law in any way step in to put a check upon a practice so sinful and degrading? From the legal as well as the religious aspect *felo de se* is a crime, and as such, in olden times, it was regarded, and, as far as possible, punished. To reach the criminal personally after he had put himself out of all jurisdiction was of course not possible, but he was branded as an outcast, his body was refused Christian burial, and was interred at a cross-road with a stake driven through it. Modern sentiment is less severe. If a jury is called on to deal with the cause of death it decides, whatever the circumstances were, that the act of self-murder was committed under stress of temporary insanity. The same merciful view is taken by the church, and the crime is practically condoned at the grave. The law might deal with suicide as it does with treason by confiscation of the worldly effects of the guilty party, and to those who were leaving property behind them it might be a deterrent to know that such would be the case. In many cases, however, suicide is the

result of the loss of property, a dread of poverty, and in others such considerations would have no application. The law punishes, as a crime, the attempt to commit suicide, but beyond that it seems to be powerless. Religion, which teaches the sacredness of human life, is, apparently, the only influence that can avail to check this great and growing evil, and it can only do so by enforcing the truth that as murder is a crime, so is suicide a crime.

The fundamental cause of the prevalence of suicide is the negation of faith—a disposition of mind inherited now through some generations educated with scarcely any knowledge of God. In former days there was a general personal belief in God as a judge and punisher. However faulty and sinful the life, there was also a sense of One higher than the individual, a rock to the weak, a refuge even to the evil-doer, One able to deliver, One more merciful than man. With this belief, or superstition if you will, though dim and scarcely thought about, the human soul was afraid to rush into the presence of the misty but portentous and all-powerful Being that rules the universe. In Shakespeare's time God was, it may be said, a Factor in all men's lives, and the alternative of endurance of utmost evil, or of self-destruction, is well debated by his great character, Hamlet, who decides that it is nobler and better "to bear the ills we have, than fly to others that we know not of."

The statistics of suicide which have been carefully elaborated shew only one positive result. In other respects they only add perplexity to knowledge. The one ascertained fact is that in any country which advances in civilization the number of suicides in proportion to population increases also. In general also it may be stated that the rate of suicide is higher in towns than in the country, and among males than among females, though this is said not to be true of the thinly settled districts in the prairie tracts of Canada and the United States. But why these things are so, is a question which has not yet received any satisfactory answer.

Occupation does not per se throw any light upon the subject

for, strange to say, there are fewer suicides among miners whose life is difficult, depressing and dangerous, than among masons and carpenters. Another remarkable fact is that in Russia, where the conditions of life would seem to be harder than in most other countries, the rate is the lowest, being but 27 per million as against 105 in England, 223 in France, and 469 in Saxony. May not the intense religious faith, corrupt as his form of religion may be, of the Russian peasant account for this wonderful difference? May not the same reason account for the fact that in Scotland the rate is 56 as compared with 223 in France? That in the United States as compared with England the proportion is as 10 to 7 and double that as compared with Scotland.

These figures would seem to bear out the theory that moral degeneracy, due to the want of religious training, has more to do with suicide than physical discomfort or mental disquiet. They do not, however, explain why Denmark should have a much higher rate than France, and more than double that of England, and why Saxony should have nearly twice as high a rate as Denmark.

Further investigation is required before we can form any definite conclusion as to the causes of suicide and by what means they may be dealt with. It may be that the subject is one to be dealt with by the psychologist rather than the theologian.

COMMON EMPLOYMENT.

It is rather remarkable that the doctrine of common employment has, in some recent cases, received a very wide application, though the number of cases in which the question can arise has enormously diminished since the Workmen's Compensation Act has been in operation, and must, necessarily, tend to decrease more and more. In *Coldrick v. Partridge, Jones & Co., Limited* (noted, *Law Times*, p. 130), Mr. Justice Bray gave an exhaustive judgment in which he reviewed the authorities and laid down the rule as to common employment in very wide terms,

following, in the main, the lines of the Master of the Rolls' judgment in *Burr v. Theatre Royal, Drury Lane* (96 L.T. Rep. 447; (1907) 1 K.B. 544). The judge there said that the basis underlying the doctrine appeared to be that under the circumstances the injured person must be taken to have accepted the risks involved by putting himself in juxtaposition with other persons employed by the same employer whose presence is incidental to the occupation in which he is engaged, and cannot complain of that which is a necessary or reasonable incident of the situation in which he has voluntarily placed himself. The rule so laid down appears to meet the difficulty with which Mr. Justice Bray was much pressed in *Coldrick's Case*, viz., that the injured workman was not in the same grade of employment as the person by whose negligence the injury was caused, though they were both employed by the same employer. But His Lordship thought that, by looking at the ultimate object of the employment, both persons might be regarded as fellow-workmen, though not engaged in the same class of work. As Chief Baron Pollock said in *Morgan v. Vale of Neath Railway Company* (13 L.T. Rep. 564; L. Rep. 1 Q.B. 149), the common object of the employment of different classes of employees is but the furtherance of the business of the master. Yet it might be said with truth that no two had a common immediate object. This shews that we must not over-refine but look at the common object, and not at the common immediate object.—*Law Times*.

An interesting case recently came before the Maryland (U.S.) Court of Appeal justifying persons, under certain circumstances, in taking the law into their own hands. In the case in question as noted in the *American Law Review*, the right of a landlord to cut down a telephone pole erected on his premises without authority was sustained. The pole in question was erected on an alley adjoining defendant's lot after the company had asked permission of the defendant and the latter had refused to grant it. The landowner at first brought a bill in equity to require the company to remove the pole, but before the trial,

notified the company that he should abandon the suit, and, unless it removed the pole, should cut it down himself. The company had put a transformer on the pole after the bill in equity had been brought. In cutting down the pole the wires were cut by an expert, and secured so that no injury would be caused by them, but a crossarm was broken and the transformer damaged by the fall of the pole, no measures being taken to protect them. The decision proceeds on the ground that a person injured by a nuisance may abate it whether it is a public or private nuisance.

A point of interest in reference to criminal jurisdiction was referred to in a note of *Rex v. Warden of Dorchester Penitentiary*, ante, page 358. This note, however, did not fully, nor perhaps quite accurately, bring out the point decided. The judgment of Mr. Justice White, who spoke for the court, decides that a police magistrate acting under s. 777 of the Revised Criminal Code, (formerly s. 788) has the same territorial jurisdiction as the General Sessions in Ontario, and consequently a police magistrate of the city of Halifax has power to hear and decide cases for indictable offences of burglary committed in that part of the province of Nova Scotia. The judgment of the above case was decided on the ground that as s. 777 confers the same jurisdiction on police magistrates as that possessed by the General Sessions of the Peace in Ontario, which court by s. 577 (formerly 640) has jurisdiction over the entire province, then such magistrates have a like discretion.

The many friends of Chief Justice Falconbridge of the King's Bench Division of the High Court of Justice, Ontario, will be glad that the distinction of Knighthood has been conferred upon him, amongst the birthday honours of His Gracious Majesty. We note also that Chief Justice Taschereau of the King's Bench, Quebec, has also been made a Knight Bachelor. Sir Charles Fitzpatrick has been honoured with a seat at the Privy Council. The Canadian Bar will be glad to see him in the Judicial Committee.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

COLLISION—DAMAGE TO CARGO—ACTION AGAINST WRONGDOER BY OWNER OF GOODS—BUYERS NOT OWNERS AT TIME OF LOSS—PAYMENT BY BUYERS—SETTLEMENT OF LOSS OF BUYERS BY UNDERWRITER—SUBROGATION—RIGHT OF UNDERWRITERS TO RECOVER IN NAME OF SELLERS.

The Charlotte (1908) P. 206 was an action on behalf of underwriters to recover against wrongdoers the damage caused to cargo by reason of a collision, in which the difficulty arose of a technical character as to who was the legal owner of the goods at the time of the collision, and consequently in whose name the action should properly be brought. The goods were sold under a cost, insurance, and freight contract, and at the time of the collision the buyers had not actually paid the price. But they did so three days after the collision and in ignorance of it having taken place. The carrying vessel put in to a port of distress and the goods were sold on behalf of the underwriters with whom the sellers had effected a policy for the benefit of whom it might concern. The action was brought on behalf of the underwriters in the name of the buyers and by leave of the judge at the trial the sellers were also added as co-plaintiffs, and the other vessel having been found alone to blame the amount of the damage was referred to the registrar who rejected the claim of the sellers suing on behalf of the underwriters, on the ground that as the sellers had been paid by the buyers the full price of the goods, they had sustained no loss. This report was confirmed by Deane, J., but the Court of Appeal (Lord Alverstone, C.J. and Farwell, and Kennedy, L.JJ.) were happily able to hold that this technicality could not prevail and that the payment of the price to the sellers did not disentitle the underwriters to recover the loss from the wrongdoer in the name of the sellers who were the legal owners of the goods at the time of the collision.

SHIP—ADVANCE OF PURCHASE MONEY—RESULTING TRUST—EVIDENCE—REGISTERED OWNER—EQUITABLE RIGHT.

The Venture (1908) P. 218 was an Admiralty action to determine the right to the proceeds of a yacht which had been

sold. The question of the claims upon the fund were referred to the registrar. He found that the yacht had been bought for £1,050 of which £550 had been advanced by one of the claimants, but he was not satisfied that the advance had been made on the terms of this claimant becoming part owner. This report was confirmed by Bucknill, J., and the whole of the proceeds were ordered to be paid to the registered owner: but on appeal this decision was reversed, the Court of Appeal (Lord Alverstone, C.J. and Farwell, and Kennedy, L.JJ.) holding that the fact that the claimant had advanced a part of the purchase money raised a presumption in his favour in accordance with the ordinary rule relating to resulting trusts, and as this had not been displaced by any counter evidence the claimant was entitled to 55-105 of the proceeds.

WATERWORKS—STATUTORY POWERS—ULTRA VIRES.

Attorney-General v. Frimley & F. District Water Co. (1908) 1 Ch. 727. This was an action to restrain a water company from exceeding its statutory powers. By a Special Act the defendants were empowered to construct in a specified place waterworks for the supply of water for certain localities. The company was also empowered to acquire by agreement land not exceeding ten acres for the purposes of its waterworks. The defendants had acquired the extra land at some distance from their authorized works and proposed to sink a well and erect a pumping station thereon for the purpose of tapping a new supply of water and pumping the water into an existing reservoir constructed under the provisions of the Act. This Eady, J., considered was in effect using the additional land for carrying on a new undertaking, whereas the statute in question only empowered the defendants to acquire the land for purposes ancillary to their statutory undertaking, and with this view the Court of Appeal (Cozens-Hardy, M.R. and Moulton, and Buckley, L.JJ.) concurred.

COMPANY—RECONSTRUCTION—SALE OF UNDERTAKING TO NEW COMPANY FOR PARTIALLY PAID SHARES—DISTRIBUTION OF CONSIDERATION—COMPANIES' ACT 1862 (25-26 VICT. C. 89) s. 161—(7 EDW. VII. C. 34, s. 188(O).)

Bisgood v. Henderson's Transvaal Estates (1908) 1 Ch. 743. This was an action by a shareholder to restrain the defendant company from carrying out a scheme for selling its

undertaking to a new company for partly paid shares in such new company. The shares in the defendant company were £1 shares and the scheme for the sale of its undertaking provided that the consideration for the sale was to be an equal number of £1 shares in the new company on which only 17s. 6d. was paid. These new shares it was proposed to allot to the shareholders in the defendant company in the proportion of one new share for every old share they held, and those who refused to accept such allotment were to be compensated for their shares in the defendant company by the price to be realized from the sale of such new shares as they refused to accept. This Eve, J., considered to be a legitimate arrangement, but the Court of Appeal (Cozens-Hardy, M.R. and Buckley, and Moulton, L.JJ.) regarded it as a scheme for levying an assessment on the shareholders of the defendant company, and imposing an increased liability in respect of their shares, with the alternative of being dispossessed of their status as shareholders in the defendant company and therefore ultra vires and in contravention of s. 161 of the Companies Act 1882 (see 7 Edw. VII. c. 34, s. 188 (O.)). The arrangement was attempted to be supported as being authorized by the original memorandum of association, but the Court of Appeal held that it was not competent to validly provide for any such arrangement in the memorandum of the association.

COMPANY—VOLUNTARY WINDING UP—CONTEMPORANEOUS RESOLUTION TO WIND UP, AND FOR RECONSTRUCTION—INVALIDITY OF SCHEME FOR RECONSTRUCTION.

In *Thomson v. Henderson's Transvaal's Estates* (1908) 1 Ch. 765 another question affecting the same company is discussed. Contemporaneously with the scheme for reconstruction referred to in the last case and which was held to be invalid, a resolution had been passed for the voluntary winding up of the defendant company, and the object of this action was to determine whether the resolution for winding up was valid, notwithstanding that the reconstruction arrangement was held to be invalid. Eve, J., held that it was, and the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.JJ.) affirmed his decision, as Buckley, L.J., put it, the passing of the resolution to wind up altered the status of the company from a going concern to one in liquidation, and though the object for which the resolution was passed may have failed, yet it was like a woman

marrying for some purpose which failed, the step was irrevocably taken, and could not be retraced.

ADMINISTRATION—BREACH OF TRUST—ACCOUNT—"WILFUL
NEGLECT AND DEFAULT"—REMOVAL OF TRUSTEE.

In re Wrightson, Wrightson v. Cooke (1908) 2 Ch. 789 was an action against a trustee for an account alleging a breach of trust. Certain breaches were alleged in the pleadings but the plaintiff at the trial took a judgment in common form for an account. This according to the English practice would not entitle the plaintiff upon the reference to go into other breaches of trust than that alleged in the pleadings and he applied to the court at a subsequent stage of the proceedings for permission to set up and have an inquiry as to other breaches of trust, but Warrington, J., held that this could not be done, though it would seem that in Ontario under Ont. Rule 667, even without any specific direction, it would be competent for a master to go into any such matter. But there is another point in the case which should be noted, viz, that the learned judge also held that the court might at any stage of the proceedings if it should see fit, in the interest of the trust estate, or the beneficiaries, remove a trustee even though that relief had not been prayed for in the statement of claim.

WILL—LAND SUBJECT TO INCUMBRANCE—OPTION TO PURCHASE
GIVEN BY WILL—INTEREST OF DONEE IN RIGHT OF PRE-EMP-
TION—DEVISEE—REAL ESTATES CHARGES ACT 1854 (17-18
VICT. c. 113) s. 1—(R.S.O. c. 128, s. 37.)

In re Wilson, Wilson v. Wilson (1908) 1 Ch. 839. A testator by his will gave one of his sons an option to purchase two houses from his trustees at the sum of £450. The two houses were subject to a mortgage of £300. The son elected to exercise the option, and claimed that he was entitled to a conveyance free from the incumbrance, and Warrington, J., held that he was, and that he was not in the position of an heir or devisee of the land, and therefore the Statute 17-18 Vict. c. 113, s. 1 (R.S.O. c. 128, s. 37) did not apply.

COMPANY—ACTION TO RESCIND CONTRACT TO TAKE SHARES—IN-
JUNCTION RESTRAINING FORFEITURE OF SHARES—PAYMENT
INTO COURT.

Lamb v. Sambas Rubber, etc., Co. (1908) 1 Ch. 845 was an action to rescind a contract to take shares in a limited company.

The plaintiff had made a payment on the shares, and the company threatened to forfeit the shares pending the action for nonpayment of a call, the plaintiff therefore applied for an interim injunction to restrain the forfeiture pending the action, and it was granted by Neville, J., on the terms of the plaintiff giving the usual undertaking as to damages, and paying into court the amount of the call with interest.

ADMINISTRATION—STATUTE BARRED DEBT—RESIDUARY LEGATEE,
ALSO RESIDUARY LEGATEE OF DEBTOR'S ESTATE.

In re Bruce, Lawford v. Bruce (1908) 1 Ch. 850 was an application to determine whether a legatee of a share in a testator's estate, was obliged to bring into account a debt owed to the testator by an estate of which he was also residuary legatee, and which was barred by the Statute of Limitations. The testator A. died in 1882 leaving James Bruce a share of his residuary estate. In 1878 the testator had lent his sister Emily £200 at 5 per cent. interest, but no payment or acknowledgment had been made on account of either principal or interest since November, 1880. Emily died in 1903 and James Bruce was also her residuary legatee and as such received from her estate £5,000. Was he, or was he not, bound to give credit for the £200 and interest at 5 per cent. from November, 1880, in respect of his share in the residue of the estate of testator A.? Neville, J., on the authority of *Courtenay v. Williams* (1844) 2 Hare 539; (1846) 15 L.J. Ch. 204 held that he was bound, and that the other residuary legatees of that estate were entitled to say to him "to the extent of the debt and interest in your hands you must pay yourself on account of your share in the residue of the testator's estate."

JURISDICTION—PARTIES RESIDENT IN ENGLAND—LAND SUBJECT
OF ACTION SITUATE IN FOREIGN COUNTRY.

Deschamps v. Miller (1908) 2 Ch. 856. The action was brought by the plaintiff as issue of a French marriage claiming title thereunder to lands in India. The father and mother were domiciled in France and were there married in 1831, and by the marriage contract it was provided that the marriage should be governed by the regime dotal. Under this the plaintiff claimed that his mother was entitled to one-half of the after-acquired property. The father and mother went to live in India and the father acquired property in Madras. In 1865

while the plaintiff's mother was living, his father went through the form of marriage with another woman, on whom he purported to settle certain property in Madras. The object of the action was to impeach this settlement and establish the plaintiff's rights under the regime dotal, but Parker, J., held that the lands being in a foreign country, and the relief sought not being merely in personam, the court had no jurisdiction and dismissed the action.

INFANT'S ESTATE—CONVERSION OF REALTY OF INFANT—PROCEEDS OF REALTY OF INFANT DYING INTESTATE.

In *Burgess v. Booth* (1908) 1 Ch. 880, Eve, J., holds that where the real estate of an infant has been sold by order of the court for the purpose of satisfying costs of an action, and a surplus of the proceeds remains in court and the infant owner afterwards attains majority and dies intestate, the surplus is to be regarded as realty, and descends to the heir at law and not to the next of kin of the deceased. See R.S.O. c. 168, s. 8.

CRIMINAL LAW—CRUELTY TO CHILDREN—PARENT LIVING APART FROM WIFE—CUSTODY OF CHILD—WILFUL NEGLECT OF CHILD—PREVENTION OF CRUELTY TO CHILDREN ACT, 1904 (4 EDW. VII. c. 15) s. 1—(CR. CODE, SS. 241, 242).

Rex v. Connor (1908) 2 K.B. 26. This was a prosecution under the Act for Prevention of Cruelty to Children, 4 Edw. VII. c. 15, s. 1 (see Cr. Code, ss. 241, 242). The defendant was the father of five children in question, who were in the care of their mother, from whom the defendant was living apart. He had contributed nothing to the support of his wife or children, though earning 25s. a week, and they were in a state of destitution. The jury found the prisoner guilty, and on a case stated the Court for Crown Cases Reserved (Lord Alverstone, C.J., and Grantham, Lawrance, Ridley, and Pickford, JJ.) held that the defendant could not by living apart from his wife divest himself of the custody of his children so as to free himself from liability to conviction for neglecting to supply them with necessaries of life, and the mere omission to pay any part of his earnings for their support may constitute "wilful neglect" within the meaning of the statute.

AGREEMENT FOR LIEN FOR CURRENT ACCOUNT—BILL OF SALE—
 LICENSE TO TAKE POSSESSION—BANKRUPTCY OF DEBTOR—
 DAMAGE FOR TRESPASS, CAUSING BANKRUPTCY—CAUSE OF AC-
 TION PASSING TO TRUSTEE IN BANKRUPTCY—SET-OFF.

In *Lord v. Great Eastern Ry.* (1908) 2 K.B. 54, the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) have reversed the judgment of Phillimore, J., (1908) 1 K.B. 195 (noted ante, p. 227), and have held that the agreement for a lien on the goods and license to take possession in default of payment was in effect a bill of sale, and as such void as against the trustee in bankruptcy for non-registration (Moulton, L.J., dissenting). The court, however, agreed with the view of Phillimore, J., on the question of set-off. The defendants at the time of the receiving order in bankruptcy had a claim for freight, and at that date the bankrupt's right was to have a return of the goods taken possession of by the defendants under the void agreement, and these claims were not the subject of set-off under the Bankruptcy Act, s. 38.

PRINCIPAL AND AGENT—STOCK BROKER—RIGHT OF BROKER TO IN-
 DEMNITY FROM CUSTOMER—PAYMENT MADE BY BROKER WITH-
 OUT CUSTOMER'S AUTHORITY.

Johnson v. Kearley (1908) 2 K.B. 82. This was an action brought by a stock broker against his customer to recover moneys paid in the purchase of stocks pursuant to the defendant's instructions. The facts were that the plaintiffs were instructed by the defendant to buy ten shares of certain stocks, and the plaintiff employed a firm of London stock brokers to buy the shares in question. This firm purchased the shares at 98 7-16 from a jobber. The firm added to the purchase price their own commission and charged them to the plaintiff at "98½ net." The plaintiff then charged them to the defendant at 98½ and also charged as their own commission 7s. 6d. The defendant was not informed that the actual purchase price was 98 7-16, or that the London firm's commission was included in the 98½, and the word "net" was omitted. In these circumstances Bucknill, J., held that the plaintiff could recover nothing because in order to succeed he must prove that he had carried out the defendant's instructions; and his charging the defendant with more than was actually paid for the shares, and the omission to disclose the fact that part of the money represented to have been paid for them had been in fact paid as commission to the London

firm, were such a departure from his instructions as to disentitle him to recover even the money paid less the commission of the London firm. This judgment we fear would not commend itself to the average stock broker and, indeed, the learned judge himself expresses regret at the necessity for his deciding as he did, because the main defence on which the defendant relied had failed.

PRACTICE—CONDITIONAL ORDER—NON-FULFILMENT OF CONDITIONS
—COMPELLING PERFORMANCE OF CONDITIONS—RULE 580—
(ONT. RULE 638).

In *Talbot v. Blindell* (1908) 2 K.B. 114, an order had been granted giving the defendants as lessees relief from the forfeiture of the lease, upon certain conditions. Some of the conditions had been complied with, and the defendants then refused to comply with the other conditions, and consequently abandoned the relief given by the order. The plaintiff thereupon applied to the court for an order to compel the defendants to carry out the conditions, but Walton, J., held that he had no jurisdiction to compel the defendants to fulfil the conditions, and that they were within their rights in electing to abandon the benefit of the order; though it would, of course, have been otherwise if the order had been based on their undertaking to perform such conditions.

PUBLIC BODY—EXPROPRIATION OF LAND—STATUTORY POWER OF
EXPROPRIATION—NOTICE TO TREAT—CREATION OF NEW INTER-
EST AFTER NOTICE TO TREAT—COMPENSATION.

In *Zick v. London United Tramways* (1908) 2 K.B. 126 the Court of Appeal (Barnes, P.P.D., and Farwell and Kennedy, L.JJ.) have affirmed the judgment of Jelf, J., (1908) 1 K.B. 611 (noted ante, p. 346), but on a somewhat different ground, the Court of Appeal being of the opinion that the original term was in fact still subsisting and had never been effectually surrendered, because after the service of notice to treat the lessors were debarred from creating a new term, and therefore the consideration for the surrender failed, and it never took effect.

PRACTICE—DISCOVERY—LIBEL—JUSTIFICATION — PARTICULARS OF
JUSTIFICATION—ALLEGED MISCONDUCT OF BUSINESS—INSPEC-
TION OF BOOKS.

Arnold v. Bottomley (1908) 2 K.B. 151 was an action for libel. The libel complained of was that the defendants carried

on their business in an improper and were fraudulent dealers in stocks and shares. The defendant pleaded justification, and gave particulars of the defence in which they alleged that the plaintiffs were concerned in running "a bucket shop" and did not carry on the ordinary and legitimate business of stock brokers, but were entirely dependent for their profits on the losses made by their customers, and gave the names of, and extracts from, certain pamphlets issued by the plaintiffs; but the defendants did not give any specific instance of the commission of any fraudulent or improper act, or the name of any person alleged to be defrauded. The defendants obtained from a Master an order for the inspection of the books of the plaintiffs for a certain period, which on appeal was reversed by Pickford, J., whose judgment was affirmed by the Court of Appeal (Williams, Farwell and Kennedy, L.JJ.) on the ground that no specific acts of fraud were alleged and the defendant's application was in the nature of a fishing proceeding to find out if they could find any support for their "defence of justification."

PRACTICE—WRIT OF SUMMONS—SERVICE OUT OF THE JURISDICTION—BREACH OF CONTRACT—CONTRACT FOR SALE OF GOODS
C. I. F.—RULE 64(e)—(ONT. RULE 162(e).)

In *Crozier v. Auerbach* (1908) 2 K.B. 161, the defendant appealed from an order of Bigham, J., refusing to set aside an order allowing service of notice of the writ of summons on the defendant out of the jurisdiction. The action was brought for breach of a c. i. f. contract made in Germany by the defendant who was resident there, and where the goods were shipped for carriage to England. The plaintiff paid the price in exchange for the bill of lading. On arrival of the goods in England, they were found by plaintiff to be not according to contract. The action was brought to recover the price paid, or for damages. An order was made allowing notice of the writ to be served out of the jurisdiction. The defendant in his correspondence with his solicitor protested against the jurisdiction of the English Court, but his solicitor, under a mistake, and without instructions so to do, entered an appearance. The defendant then applied to Bigham, J., to set aside the appearance and the order allowing service out of the jurisdiction, who refused the application on the ground that the defendant's letters after service amounted to a waiver of his objection to the jurisdiction of the English court. The Court of Appeal (Wil-

liams and Farwell, L.JJ.) were of the opinion that it being clear that under a cost, insurance and freight contract the property in the goods passed to the plaintiff at the port of embarkation, the breach of the contract, if any, took place there, and the case was therefore not within the Rule 64(e) (Ont. Rule 162(e)). *Barrows v. Myers*, 4 Times L.R. 441, to the contrary was overruled and the order of Bigham, J., reversed.

POST NUPTIAL SETTLEMENT—PURCHASER FOR VALUE—CONSIDERATION—REFRAINING FROM TAKING DIVORCE PROCEEDINGS.

In re Pope (1908) 2 K.B. 169. A post nuptial settlement was attacked by a trustee in bankruptcy of the settlor as being voluntary and without consideration, but it appearing that the settlement had been made in consideration of the settlor's wife (one of the beneficiaries) refraining from taking divorce proceedings it was held by Cozens-Hardy, M.R., and Moulton, L.J., that this constituted a valuable consideration for the settlement, which was accordingly upheld, Buckley, L.J., however, dissented.

TRANSFER OF STOCK—PERSONATION OF HOLDER—IDENTIFICATION OR TRANSFEROR BY BROKER—FORGER—LIABILITY OF BROKER FOR ERRONEOUS REPRESENTATION.

Bank of England v. Cutler (1908) 2 K.B. 208. This is an important case as to the liability of a broker who procures a fraudulent transfer of stock to be made by reason of his having innocently but erroneously identified the transferor as the true holder of the stock. Lawrence, J., held that the broker was liable (1907) 1 K.B. 889 (noted ante, vol. 43, p. 500) and the majority of the Court of Appeal (Farwell and Kennedy, L.JJ.) have affirmed his decision, but Williams, L.J., dissented, being of the opinion, that on the evidence it could not be said that the defendant had done more than act as a witness, and that it failed to establish that he had in any way requested or directed the transfer to be made. A considerable sum is involved, and in view of the dissent in the Court of Appeal, it would not be surprising if the case were carried to the House of Lords, but it would be equally surprising if the appeal were successful, as there can hardly be any question that the representation was made with the intention and expectation that the plaintiffs should act upon it.

VETERINARY SURGEON—QUALIFIED PERSON—USE OF DESCRIPTION BY UNQUALIFIED PERSON—"CANINE SPECIALIST"—VETERINARY SURGEONS' ACT (44-45 VICT. c. 62) s. 17(1)—(R.S.O. c. 184, s. 3).

In *Royal College of Veterinary Surgeons v. Collinson* (1908) 2 K.B. 248 it is held by a Divisional Court (Lord Alverstone, C.J. and Ridley and Darling, JJ.) that for a person who is not a registered veterinary surgeon to exhibit a notice board on his residence with the words "Canine Specialist—dogs and cats treated for all diseases," is an offence against the Veterinary Surgeons' Act (44-45 Vict. c. 62) s. 17; (see R.S.O. c. 184, s. 3).

NEGLIGENCE—DANGEROUS PREMISES—BUILDING LET OUT IN FLATS—STAIRCASE IN POSSESSION OF LANDLORD—STAIRCASE NOT LIGHTED—LIABILITY OF LANDLORD TO PERSONS OTHER THAN TENANTS.

Huggett v. Miers (1908) 2 K.B. 278. This was an action to recover damages for injury sustained by the plaintiff by reason of the alleged negligence of the defendant in omitting to light a staircase in his building. The building in question was owned by the defendant and let out in flats. The agreements for letting contained no provision for keeping the staircase, which led to the flats, lighted. The tenants had gas lights on the landings outside their respective offices which were supplied with gas from their own meters, and their practice was to turn them off at night. The plaintiff while in the employ of one of the tenants, on coming down the staircase from his employer's offices, in the evening at 8.15, when all the lights had been put out, failed to find his way out to the street and on going down to the basement fell through a door opening into a flagged courtyard some distance below, and suffered injury for which the action was brought. Channell, J., who tried the action was of the opinion that there was no duty on the defendant to keep the staircase lighted, but left the case to the jury to avoid the necessity for a new trial, and the jury found a verdict for the defendant. The Court of Appeal (Barnes, P.P.D. and Moulton, and Farwell, L.JJ.) agreed with Channell, J., that the defendant was not liable, and dismissed the action.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ex. C.]

[May 29.]

BONANZA CREEK HYDRAULIC CONCESSION *v.* THE KING.

Mining regulations—Hydraulic lease—Breach of conditions—Construction of deed—Forfeiture—Right of lessees—Procedure on inquiry—Judicial duties of arbiter.

Under a condition for defeasance in a lease of a mining location, made by the Crown in virtue of the hydraulic mining regulations of 3rd December, 1898, a provision that the Minister of the Interior is to be the "sole and final judge" of the fact of default by the lessee does not entitle the Crown to cancel the lease and re-enter until the fact of such default has been determined by the minister in the exercise of the functions vested in him after an inquiry made in a judicial manner and an opportunity has been afforded to all parties interested of knowing and being heard in respect to the matters alleged against them in such investigation. *Lapointe v. L'Association de Bienfaisance* (1906) A.C. 585, and *Edwards v. Aberayon Mutual Ship Insurance Society*, 1 Q.B.D. 563, referred to.

The lease provided a forfeiture for breach of conditions "other than that referred to" in the fourth clause.

Held, that, of several conditions in the clause in question, the exception applied only to that providing for forfeiture on failure by the lessee to make specified annual expenditures on the leased premises, of default in which the minister was to be the sole and final judge, and in respect of which his decision predetermined the rights of the lessee.

Quære, per IDINGTON, J., whether there was not sufficient evidence in the case to shew that there had been no such breach of the conditions as could work a forfeiture of the lease?

Appeals allowed with costs.

Chrysler, K.C., *Belcourt*, K.C., and *J. A. Ritchie*, for appellants. *Newcombe*, K.C., and *Shepley*, K.C., for respondent.

N.B.]

FARRELL v. MANCHESTER.

[June 16.

Company—Paid-up shares—Sale through broker—Prospectus—Misrepresentation—Liability of directors—Rescission—Delay.

F. in June, 1903, purchased paid-up shares of an industrial company's stock on the faith of statements in a prospectus prepared by a broker employed to sell them. In January, 1904, he attended a meeting of shareholders and from something he heard, suspected that some of the statements on which he had relied were untrue and after investigation he demanded his money back from the broker and also wrote to the president and secretary of the company repudiating his purchase and asking for cancellation and repayment. He repeated such demand at later meetings of the company and, in December, 1904, brought suit for rescission and repayment.

Held, that the delay in bringing suit from January to December did not operate as a bar to the suit and plaintiff was entitled to recover against the company. And also that he could not recover against the directors who had instructed the broker to sell the shares as they were not responsible for the misrepresentations in the prospectus prepared by the broker.

Judgment of the Supreme Court of New Brunswick (38 N.B. Rep. 364), affirming the decree of the judge in equity (3 N.B. Eq. 508), reversed. Appeal allowed with costs.

Ewart, K.C., and *J. M. Price*, for appellant. *Harrington*, K.C., and *Teed*, K.C., for respondents.

N.S.]

GOULD v. GILLIS.

[June 16.

Company—Sale of shares—Misrepresentation—Fraud—Action for deceit—Accord and satisfaction.

G., holder of 400 shares in an industrial company handed over 290 to the president to be sold. The president gave them with some of his own and some of the company's stock to an agent who canvassed, among others, J. A. G., representing to him, and believing, that it was all treasury stock. J. A. G. thereupon purchased 25 shares of the stock held by E. L. G., giving his note for the purchase money, which was endorsed over to the latter. Later on J.A.G. discovered that the stock did not belong

to the company and correspondence ensued between him and the secretary in which he complained of having been deceived by the agent, but finally agreed to give a renewal at four months of his note. Before the renewal fell due the company became insolvent and he refused to pay. In an action on the renewal note he filed a counterclaim for damages based on the misrepresentation and deceit. Judgment was given against him on the note and for him on his counterclaim.

Held, that G. was liable for the consequences of the fraud practised on the purchaser of his shares by his agent the president of the company.

Held, also, GIROUARD and DAVIES, JJ., dissenting, that the renewal of the note given for the price of the shares and extension of time for payment thereby secured did not operate as a release of J.A.G.'s action for deceit, though it might have been a defence in an action for rescission. Appeal dismissed with costs.

Matthew Wilson, K.C., and W. B. A. Ritchie, K.C., for appellant. W. F. O'Connor, for respondent.

Ont.]

IREDALE v. LOUDON.

[June 16.]

Title to land—Upper room in building—Adverse possession—Statute of Limitations—Incidental rights—Implied grant—License or easement.

Possession of an upper room in a building supported entirely by portions of the story beneath may ripen into title there to under the provisions of the Statute of Limitations. I., one of several owners of land with a building thereon sold his interest to a co-owner and afterwards occupied a room therein as tenant for carrying on his business. Inside the door by which he entered from the street was a landing leading to a staircase by which his room could be reached. He had the only key provided for this door and always locked it when leaving for his home at night. It remained open during the day. His payment of rent ceased after a time and he continued to occupy the room for twelve years thereafter, the owners of the premises paying all the taxes thereon, he sending them the tax bills left in his room. In an action to enjoin the owners from disturbing him in possession of said room,

Held, reversing the judgment of the Court of Appeal (15 Ont. A.R. 286) by which the judgment for I. at the trial (14 Ont.

L.R. 17) was reversed, IDINGTON and MACLENNAN, JJ., dissenting, that I.'s possession had ripened into title under the Statute of Limitations of the room and the landing inside the door.

Held, per DAVIES, J.—The possession of the room for the statutory period carried with it a proprietary right to the supports thereof and to the landing and staircase which provided access thereto.

Per FITZPATRICK, C.J., and DUFF, J.—The Statute of Limitations does not annex to a title acquired by possession incidents resting on the implication of a grant. I. had, therefore, acquired no rights in the supports of the room which he occupied or in the staircase leading thereto, but had in the landing inside the door which rested directly on the soil.

Per IDINGTON and MACLENNAN, JJ.—I. acquired a statutory title to nothing but the room itself; he had no "natural right" to the supports as incidental to his possession of the room; and his user of the landing and stairway was, at the most, an easement which must continue for twenty years to confer title.

Appeal allowed with costs.

W. N. Tilley, for appellant. *W. D. McPherson*, K.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

Full Court.]

REX v. YALDON.

[June 19.

Criminal law—Perjury—Indictment—Lord's Day Act, C.S.U.C., c. 104 still in force—Record of trial—Police magistrate.

This was a case reserved by the chairman of the general sessions of the peace for Wentworth. The defendant was found guilty of perjury on an indictment which charged him with having committed perjury in reference to a charge of gambling on the Lord's Day by swearing that he did not see any such offence committed. The jury found the accused guilty, but the chairman deferred sentence, reserving certain questions for the opinion of the court.

Held, 1. That an indictment which contains in substance a statement that the accused committed perjury in a judicial proceeding is not bad because it does not allege that the person committed the crime with intent to deceive or mislead, so long as it complies with the requirements prescribed by s. 852 of the Criminal Code and form 64.

2. The Act to prevent the profanation of the Lord's Day, C.S.U.C., c. 104, s. 3, is still in force in Ontario. See *Attorney-General v. Hamilton Street Ry. Co.* (1903) A.C. 524. The result of the determination of that case being that the provisions of 40 Vict. c. 6, s. 6(O.) were not effective to repeal C.S.U.C., c. 104, although the latter appears in schedule A. to R.S.O. 1877, as one of the repealed Acts.

3. The prisoner could not escape conviction merely because the Crown did not produce any record of the trial or the result thereof in the police court, where the perjury was alleged to have been committed, following *Reg. v. Hughes*, 4 Q.B.D. 614; *Reg. v. Shaw*, 10 Cox C.C. 66.

Cartwright, K.C., and *Washington*, K.C., for Crown. *Lynch-Staunton*, K.C., and *O'Reilly*, K.C., for prisoner.

Full Court.]

[June '19.

CROWN BANK v. LONDON GUARANTEE & ACCIDENT CO.

Fidelity bond for bank clerks—Theft by one clerk and negligence of another preventing discovery of theft—Expenses incurred in following thief.

One Banwell, being a clerk in plaintiffs' bank, absconded, taking with him a large sum of plaintiffs' money. It was the duty of one Maunsell to check Banwell's cash. The bank followed Banwell and recovered a large portion of the sum stolen, but in doing so expended some \$8,000.

Held, 1. Confirming the trial judge that Maunsell was negligent in not discovering the discrepancy in Banwell's cash. This negligence consisted in the failure to observe and carry into efficient practice the duties which were imposed upon him for the purpose of discovering and frustrating any attempt to commit such a theft as was committed by Banwell. The court drew a distinction between this case and that of *Baxendale v. Bennett*, 3 Q.B.D. 52, where the negligence complained of consisted in rendering it possible for such a crime to be committed.

2. The plaintiffs were justified in claiming from the defendants the amount expended by the bank in recovering the balance of the money stolen.

Arnoldi, K.C., and *Hellmuth*, K.C., for plaintiffs. *Shepley*, K.C., and *Swabey*, for defendants.

Moss, C.J.O., Osler, Garrow,
McLaren, J.J.A., Riddell, J.]

[June 19.]

TINSLEY v. TORONTO RY. CO.

Street Ry. Co.—Contributory negligence—Person crossing track.

The plaintiff being on the other side of the street saw a car coming close to where it usually stopped to take on passengers. He also saw a man signal for the car to stop. He assumed that the car would stop accordingly and crossed the track in front of car, but was knocked down and injured.

Held, that plaintiff was not guilty of contributory negligence and that the defendants were liable.

J. H. Denton, for plaintiff. *D. L. McCarthy*, K.C., for defendant.

Full Court.]

[June 19.]

IN RE TOWNSHIPS OF SANDWICH AND WINDSOR, AND TECUMSETH
ELECTRIC RY. CO.

*Street railways—By-law of municipality—Passenger fares—
School children.*

A by-law relative to the defendants railway, a street railway, for an ordinary cash fare of five cents, children under five years of age, not occupying a seat and accompanied by its parent to be carried free; and that, "for every child under 12 years of age, except as aforesaid, the fare shall not exceed three cents." Provision was then made for the issue of tickets, it being provided that tickets should be issued to "children and school children," namely, 10 for 25 cents, each ticket to be taken for a 3 cent fare as above provided.

Held, reversing the order of the Ontario Railway and Municipal Board, that the school children entitled to such tickets were those under the age of twelve years, the provisions not ex-

tending to all those under twenty-one years of age actually attending school.

A. H. Clarke, K.C., for railway company. J. H. Rodd, for township of Sandwich.

HIGH COURT OF JUSTICE.

Falconbridge, C.J.K.C., Teetzel, J., Riddell, J.] [April 23.

IN RE HASSARD AND CITY OF TORONTO.

Intoxicating liquors—Liquor License Act—Municipal corporations—By-law to reduce number of licenses—Construction of statutes and by-laws—Unauthorized limitation—Ultra vires—Meaning of “year.”

By sub-s. 1 of s. 20 of the Liquor License Act, R.S.O. 1897, c. 245, the council of every city is authorized by by-law passed before March 1 in any year to limit the number of tavern licenses to be issued therein for the then ensuing license year, beginning May 1, or for any future license year until such by-law is altered or repealed, provided such limit is within the limit imposed by the Act. Under the authority of this sub-section, the council of the city of Toronto, on Feb. 22, 1904, passed a by-law, the second section of which provided that “the number of tavern licenses to be issued shall not exceed the number of one hundred and fifty in any one year.” On Jan. 27, 1908, the council passed a by-law entitled, “A by-law to reduce the number of tavern licenses to 110,” the effect of which was to amend the second section of the first by-law, so that it would read: “The number of tavern licenses to be issued shall not exceed the number of one hundred and ten in any one year.” The number of licenses issued by the License Commissioners for the license year commencing May 1, 1907, was 144, but under s. 8, sub-s. 3, of the Act, they had authority, if special grounds were shewn, to issue the six unissued licenses at any time before May 1, 1908.

Held, Riddell, J., dissenting, that the council by the by-law of Jan. 27, 1908, assumed to limit the number of licenses which the License Commissioners had authority to issue for the license

year beginning May 1, 1907, and that the by-law was therefore ultra vires and should be quashed.

Fullerton, K.C., and *Mackelcan*, for appellants, the city of Toronto. *W. T. J. O'Connor*, for respondent.

Riddell, J.—Trial.]

[June 8.

BALLENTINE v. ONTARIO PIPE LINE CO.

Negligence—Injury to property by gas explosion—Independent contractor—Statutory powers.

The plaintiff was a grocer in the city of Hamilton and the owner of the premises, the southerly portion of which he occupied, the northerly portion being occupied by one Gordon. The defendants were an incorporated company and had obtained from the city the right by by-law to enter upon the streets, to dig trenches and lay and operate pipes for the supply of natural gas. The defendants made a contract with one Byrnes, a competent, independent contractor, for the necessary service connected with the main lines for the purpose of supplying customers with natural gas. Whilst this contract was in force and a short time prior to the accident the plaintiff's tenant, Gordon, requested the defendants to make the necessary connection between him and the main line of pipes, which were laid in front of the premises for the purpose of supplying Gordon with natural gas to his premises. The defendants notified Byrnes to have the service made in accordance with the contract existing between them. It was admitted on the statement of facts as agreed to that the employees of Byrnes negligently allowed gas to escape while constructing the trenches and thus finding its way into the cellar occupied by Gordon became ignited with the light therein, causing an explosion and injury to plaintiff's property. The plaintiff contended that the defendants are liable, (1) because they were exercising statutory powers under R.S.O. 1897, c. 191, ss. 22 and 27; (2) because they committed a nuisance in allowing the gas to escape. The defendants claimed that they were not liable as they employed a competent, independent contractor to do the work, and that he, if anybody, was liable.

Held, that this was not the case of a nuisance nor was the negligence collateral. It was the duty of the defendants in dig-

ging up the street to see that gas was not negligently allowed to escape, and this was a duty of which they could not rid themselves by delegating it to another, and it made no difference that the pipes to be opened up were those of the defendants themselves, and the defendants were not relieved by getting a contractor to perform their work for them: and were therefore liable for the damages sustained.

Lynch-Staunton, K.C., for plaintiffs. *Gauld*, K.C., for defendants.

Teetzel, J.] *MCNEILL v. LEWIS BROTHERS, LTD.* [June 12.

Discovery—Examination of officer—Foreign company—Attorney with limited powers and duties.

The defendants were a foreign corporation and their power of attorney appointed a person in Toronto as their attorney to act as such and to sue and be sued to plead and be impleaded in any court in Ontario, and, on behalf of the company, to accept service in Ontario of process and receive all lawful notices, and for the purpose of the company to do all acts and execute all deeds within the scope of the power of attorney.

Held, that their attorney was an officer of the corporation liable to be examined for discovery.

C. D. Scott, for plaintiff. *Middleton*, K.C., for defendants.

MacMahon, J.—Trial.] [June 13.

DARRANT v. CANADIAN PACIFIC RAILWAY.

Railway—Breach of statutory duty—Injury to employee—Common law liability—Damages.

The plaintiff was a brakesman on a freight train between Ottawa and Prescott. Whilst coupling the tender and an oil tank, his left arm was caught and taken off above the wrist. He was left handed. The defendants admitted their liability and paid into court \$1,000, as being sufficient to satisfy the claim. The plaintiff had, prior to 1891, been in defendant company's employment as brakesman for eight years at \$1.25 per day. After that he was in partnership with his father in the pump making business until April, 1907, when he was again

employed by the defendant company as senior brakeman, which put him in line for promotion for a freight conductorship. He was 38 years old. The average wages of senior brakeman are \$75 a month, which is what the plaintiff earned. The Railway Act, R.S.C. 1906, c. 37, s. 264, provides that "every company shall provide and cause to be used on all trains modern and efficient apparatus, appliances and means to securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars." In this case the cars which caused the accident could not be automatically coupled.

Held, 1. There was a breach of statutory duty, and as the plaintiff was injured as a result of that breach, he was entitled to recover at common law.

2. Being so entitled the damages might reasonably be fixed, under the circumstances, at \$4,500, for which judgment was entered.

G. F. Henderson, K.C., and H. A. Lavell, for plaintiff.
D'Arcy Scott, for defendants.

Riddell, J., Trial]

[June 15.

FLORENCE MINING CO. *v.* COBALT LAKE MINING CO.

Constitutional law—Powers of provincial legislature.

Action for a declaration that the Crown patent for part of the bed of Cobalt Lake was erroneously issued to the defendants and should be set aside. The learned judge made findings of fact, that the applicant went to the proper office "and procured such information as satisfied him that Cobalt Lake was open for prospecting"—"no reason for doubting the good faith," etc., and that "all legitimate means were used by the plaintiffs and generally that the evidence of the plaintiffs' engineer "should be given full credence throughout." Also that against the protest of the plaintiffs the Crown sold in fee simple the bed of the lake for a large sum to defendants without any discovery made by or for them, and a grant was made accordingly in January, 1907. The defendants had knowledge of the claim of the plaintiffs.

The learned judge, however, stated that Acts of the legis-

lature were "intended to bar the claim of the plaintiffs," and that he could not read the Act of 1907 as meaning anything less than that plaintiffs are not to have any rights in the property and remarked that, "In short, the legislature within its jurisdiction, can do everything that is not naturally impossible, and is restrained by no rule, human or divine. If it be that the plaintiffs acquired any rights—which I am far from finding—the legislature has the power to take them away. The prohibition 'Thou shalt not steal', has no legal force upon this sovereign body, and there would be no necessity for compensation to be given—we have no such restriction upon the power of the legislature as is found in some states."

J. M. Clark, K.C., and Bradford, K.C., for plaintiffs. Armour, K.C., G. F. Henderson, K.C., and Britton Osler, for defendants.

Province of Nova Scotia.

SUPREME COURT.

Russell, J.]

RE BANK OF LIVERPOOL.

[June 9.

Judgment recorded—Effect—Execution.

Application by the assignee of a judgment against H. for leave to issue execution against lands held subject to the judgment by B. to whom the lands were conveyed by the executors of the deceased judgment debtor.

Held, under the provisions of the Registry Act the recording of the judgment gives it the effect of a mortgage and the judgment creditor can release whatever part of his security he sees fit upon whatever consideration he chooses.

If the party holding the land has any equities they are not equities against the creditor and leave granted to sell the land as prayed for will not affect them.

If the conveyances of other lands were voluntary he may have a right to transfer the whole burden of the charge to those lands, or, whether voluntary or otherwise, he may have a right to contribution from the grantees of those lands.

But this does not affect the rights of the judgment creditor

who, until he receives payment, has recourse against all the securities available to him.

W. F. O'Connor and H. O. Savary, for applicant. Roscoe, K.C., contra.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] CAMPBELL v. IMPERIAL LOAN CO. [June 8.

Mortgagee—Redemption—Real Property Limitation Act, R.S.M. 1902, c. 100, s. 20—Constructive possession by mortgagee of vacant lands—Acknowledgment to prevent statutory bar—Acquiescence and laches—Condition in power of sale protecting purchasers—Exercise of power of sale by giving agreement.

Appeal from judgment of MATHERS, J., noted vol. 43, p. 707, dismissed with costs, but not on the ground taken by the court below.

The action was for redemption of a mortgage in fee covering several parcels of land given by plaintiff's predecessor in title. The mortgage became in default, 1st January, 1892. The land was vacant and, by the terms of the mortgage, the mortgagor's right to possession ceased upon default, but the mortgagees had not taken actual possession. Under the power of sale in the mortgage, the company had, between 1899 and 1903 made sales of the different parcels to the several persons who had been made co-defendants in the action. The purchasers had only entered into agreements to purchase, but had paid portions of their purchase money, entered into possession and made improvements on the lands. The sales had been made without notice to the plaintiff, replying on the provision in the mortgage that "in default of payment for one month and ten days the said mortgagees may without any notice enter upon the said land and proceed under and exercise the power of sale or lease *hereinafter* conferred." There was no such power referred to *after* that provision, but the statutory power of sale under the Short Forms Act was contained in an *earlier* portion of the mortgage. The plaintiff allowed over ten years to elapse without making any payment

on the mortgage or for taxes on the land. She knew of the making of two of the sales two years at least before commencing this action; but made no objection to any of them, although the company had sought her co-operation in endeavouring to realize on the lands. By the time the action was commenced, the lands had so increased in value that it became worth while to redeem them, if possible.

Held, 1, reversing the decision of MATHERS, J., that the "possession" referred to in s. 20 of "The Real Property Limitation Act," R.S.M. 1902, c. 100, means actual adverse possession and not a mere constructive possession of vacant lands by reason of the mortgagor being in default, and the plaintiff was, therefore, not barred by the statute. *Smith v. Lloyd*, 9 Ex. 562; *Agency Co. v. Short*, 13 A.C. 799, and *Bucknam v. Stewart*, 11 M.R. 625, followed.

2. The plaintiff had, by her laches and acquiescence in the sales made by the mortgagees, lost her right to redeem. *Archbold v. Scully*, 9 H.L. Cas. 388, and *Nutt v. Easton* (1899) 1 Ch. 873, followed.

3. The word "hereinafter" in the power of sale quoted should be construed to mean "herein" or "hereinbefore" and, so construed, the power of sale was sufficient and had been validly exercised. The court will correct such an obvious mistake. *Wilson v. Wilson*, 5 H.L. Cas. 66, and *Bengough v. Edridge*, 1 Sim. 269, followed.

4. The defendant purchasers were in any case protected by the following clause in the mortgage: "No purchaser under said power shall be bound to inquire into the legality or regularity of any sale under the said power or to see to the application of the purchase money." *Dicker v. Angerstein*, 3 Ch. D. 600, followed. If an irregular or improper sale is made by the mortgagee, the mortgagor has his remedy by way of an action for damages. *Hoole v. Smith*, 17 Ch. D. 434.

5. The agreements of sale entered into between the company and the purchasers were valid exercises of the power of sale, and conveyances were not necessary. *Thurlow v. Mackeson*, L.R. 4 Q.B. 97, followed.

6. The posting up on the land, after the making of the sales, of a notice of sale prepared by the company's solicitors did not give the plaintiff a right to redeem. It was not the act of the purchasers and their rights could not be prejudiced by it.

A. J. Andrews and Burbidge, for plaintiff. *Aikins, K.C., Haggart, K.C., Taylor and Kilgour*, for the several defendants.

Full Court.]

MEY v. SIMPSON.

[June 8.

Misrepresentation as to quality of land sold—Action of deceit—Representations not amounting to warranty.

The plaintiff complained that he had been induced by false representations made by the defendant as to the quality of a number of parcels of wild land to accept them as cash at \$9 per acre as part payment of property sold and conveyed by him to the defendant. The defendant had never seen any of the lands and did not state that he had; but he had stated to the plaintiff's agent that they were a fairly good lot of lands. There was some evidence that he had said they were all good farming lands, but the majority of the Court of Appeal considered that this was not sufficiently established.

Held, affirming the judgment of CAMERON, J., that the defendant had not been guilty of any fraudulent misrepresentation as to the quality of the lands, but had at most given an exaggerated opinion as to their quality, and, although it turned out that a large portion of them was not good enough land for farming purposes, the plaintiff could not recover. *De Lassalle v. Guildford* (1901) 2 K.B. 221 followed.

Phillips and Whittle, for plaintiff. *Burbidge*, for defendant.

Full Court.]

LOCATORS v. CLOUGH.

[June 8.

Commission on sale of land—Sale by principal to purchaser who conceals part taken by agent.

The defendant listed the property in question with the plaintiffs, real estate agents, and agreed to pay a commission on any sale effected directly or indirectly by the plaintiffs and approved by him, and he also agreed to notify them immediately if he made a sale himself. Shortly thereafter the plaintiffs suggested to one Forrest, the purchase of the property. Forrest then opened negotiations with the defendant for its purchase. Forrest concealed from the defendant the fact that the plaintiffs had suggested the purchase to him and, as an inducement to the defendant to modify his terms, represented that a sale to him would not involve the payment of any commission. Believing this, the defendant closed the sale to Forrest on terms less favourable to himself than those stated in his contract with the

plaintiffs. The circumstances were not such as to put the defendant upon inquiry as to whether or not the plaintiffs had sent Forrest to him.

Held, that the plaintiffs were not entitled to recover any commission on the sale, either under their contract or for services rendered by way of quantum meruit.

Cathcart v. Bacon, 49 N.W. Rep. 331; *Quist v. Goodfellow*, 110 N.W. Rep. 65, followed; *Mansell v. Clements*, L.R. 9 C.P. 139, and *Green v. Bartlett*, 14 C.B.N.S. 681, distinguished.

Hull and McAllister, for plaintiffs. *Metcalfe and Stacpoole*, for defendant.

NOTE:—If the facts are correctly stated, and we are assured they are, we doubt whether the above decision states the law as it stands at present. With due deference we would suggest that the plaintiff would seem to have done all that he was required to do to earn his commission, and, if so, why should he not have it? Surely, at least, he should be paid for his services on a quantum meruit. We publish the note, however, as the case will doubtless be followed in Manitoba, and has, we understand, since its delivery been referred to and distinguished, but not dissented from, in a case subsequently decided.—Ed. C.L.J.

Full Court.]

TURNER v. TYMCHORAK.

[June 8.

Interpleader—Evidence—Proof of judgment at trial of interpleader issue—Attaching order.

When a third person claims goods seized by the sheriff under an attaching order and the sheriff applies for an interpleader order, any objection by the claimant as to the want or insufficiency of the material on which the attaching order was obtained should be raised in answer to the sheriff's application, and it will be too late to raise such objection at the trial of the interpleader issue.

It is not necessary at the trial of such an interpleader issue for the plaintiff, although he is plaintiff in the issue, to prove the defendant's indebtedness, at least in the absence of evidence on the part of the claimant to shew that it did not exist. *Hol-den v. Langley*, 11 U.C.C.P. 407, and *Ripstein v. British Canadian*, 7 M.R. 119, followed.

The attaching order having been set aside by the referee after the making of the interpleader order, and the sheriff having relinquished possession of the goods, the claimant contended that the latter order then lapsed; but the attaching order had been re-instated on appeal to a judge, when the sheriff again took possession of such of the goods formerly seized as he found to be still in the claimant's possession.

Held, that the plaintiff had a right to have the interpleader issue disposed of and that, as the merits were in his favour, the verdict for him should stand, but limited in its effect to the goods seized by the sheriff after the attaching order was restored. *Howe v. Martin*, 6 M.R. 616, followed.

Appeal from CAMERON, J., dismissed with costs.

Galt and J. H. Leech, for plaintiff. *Coyne and Forrester*, for defendant.

Full Court.] *WHITMAN FISH CO. v. WINNIPEG FISH CO.* [June 8.

Sale of goods—When property passes—Retention of goods without notice of rejection to seller within reasonable time—Right of buyer to damages for breach of warranty as to quality of goods.

The defendants disputed liability for the price of a carload of finnan haddie purchased from the plaintiffs and received by defendants on February 4. The sale was by sample and the defendants discovered by the 9th of February that some of the cases were not up to sample. Thereafter they made complaints by letter of the quality of the goods, but, instead of definitely rejecting them, they sold a large number of the cases out of the carload, and it was not until March 18 following that the defendants wrote to the plaintiffs positively refusing to accept the goods.

Held, reversing the judgment of Cameron, J., that under ss. 35 and 36 of R.S.M. 1902, c. 152, the defendants had retained the goods without rejecting them within a reasonable time and were liable for the price agreed on subject to their right, under s. 52 of the Act, to whatever deduction from the price they could establish or claim for by reason of any breach of warranty as to the quality of the fish or for damages by counterclaim. *Couston v. Chapman*, L.R. 2 H.L. Sc. 250 and *Grimolby v. Wells*, L.R. 10 C.P. 393, followed.

On the evidence the court also held that it was proved that the fish were in good condition when shipped by the plaintiffs; that under s. 33, the defendants took the risk of any deterioration necessarily incident to the transit from Nova Scotia to Winnipeg by freight; that the defendants had been so careless in handling the goods after their arrival in Winnipeg that the damages subsequently resulting should be attributed to their own negligence, and that, therefore, there should be no deduction from the purchase price.

Held, also, following Benjamin on Sales, 5th ed., at pp. 355, 639, and *Badische v. Basle* (1898) A.C. at p. 207, that, although delivery to a carrier is prima facie an appropriation of the goods, yet the seller may contract to deliver them to the buyer at their destination, in which case the property does not pass till such delivery.

Appeal allowed with costs, and judgment ordered to be entered for plaintiffs for the amount of their claim and costs of suit.

Galt, for plaintiffs. *Fullerton* and *Foley*, for defendants.

Full Court.] *EMPEROR OF RUSSIA v. PROSKOURIAKOFF*. [June 8.

Jurisdiction—Service of statement of claim out of jurisdiction—Substitutional service within the jurisdiction—Non-resident foreigner—Writ of attachment against goods of.

Appeals from decisions of MATHERS, J., noted ante, pages 359 and 362, heard separately but disposed of by judgments covering both appeals.

On the hearing of the appeals, powers of attorney, executed at Chicago, U.S., 14 days before the filing of the statement of claim, in which the defendants described themselves as of Winnipeg, Canada, were for the first time put in. These instruments authorized one Popoff of Winnipeg to take charge of and deal with the defendant's property there.

HOWELL, C.J.A., and PERDUE, J.A., affirmed, but RICHARDS and PHIPPEN, J.J.A., dissented from, both decisions of MATHERS, J., and consequently both appeals were dismissed without costs.

O'Connor and *Blackwood*, for plaintiff. *Hudson* and *Levinson*, for defendants.

Full Court.]

STEWART v. HALL.

[June 8.

Solicitor and client—Collusive settlement of suit without the knowledge of his solicitor—Liability of defendant for costs of plaintiff's solicitor.

In this case the Court of Appeal, reversing the judgment of CAMERON, J., applied the principles laid down in *Brunsdon v. Allard*, 2 E & E. 19; *Price v. Crouch*, 60 L.J.Q.B. 767, and *Re Margetson & Jones* (1897), 2 Ch. 314, and

Held, that, as the defendants had collusively settled the suit with the plaintiff behind the back of his solicitor and for the purpose of depriving the plaintiff's solicitor of his costs, well knowing that such would be the result of the settlement, they should be ordered to pay to the plaintiff's solicitor his costs up to the time he received notice of the settlement, together with the costs of the application to CAMERON, J., and of the appeal, forthwith after taxation.

Deacon, for plaintiff. *Crichton*, for defendant.

KING'S BENCH.

Mathers, J.]

HOLMES v. BROWN.

[June 5.

Mandamus—Compelling mayor of city to sign cheque for payment approved by council—Existence of other adequate remedy.

Action for mandamus to compel mayor of city to sign cheque for payment of plaintiff's claim pursuant to resolution of council. The mayor had vetoed the resolution, but the council assumed to pass it again over his veto.

Held, 1. As the plaintiff had another adequate remedy for enforcing his claim, namely, by action against the city, he could not have the mandamus asked for. *The Queen v. Hull & Selby Ry. Co.*, 6 Q.B. 70; *In re Napier*, 18 Q.B. 70; *The Queen v. Registrar of Joint Stock Companies*, 21 Q.B.D. 131, followed.

2. It makes no difference that the other remedy would not lie against the defendant but against the city: *Queen v. Commissioners of Inland Revenue*, 12 Q.B.D. 461.

Meighen, for plaintiff. *Wilson and McPherson*, for defendant.

Mathers, J.]

COTTER v. OSBORNE.

[June 5.

Trades unions—Strikes—Combined action—Conspiracy to injure plaintiffs—Picketing and besetting—Injunction—Damages.

The members of a labour union, in order to compel the plaintiffs, employers of both union and non-union men, to give them higher wages and other advantages, went on strike and took steps to induce the men who remained at work to come out, and to prevent others from entering into the plaintiffs' employment although they had contracted to do so. They had pickets watching the plaintiffs' shops and places where they had work to do, others to meet trains coming into Winnipeg from the East and persuade men coming to work for the plaintiffs to break their contracts, others to attend for a like purpose on the arrival of the trains, and others to talk to the men working on different jobs with the like object. All this was done pursuant to a determined conspiracy among the defendants for that purpose, and it had proved effectual until the issue of an interim injunction in this action forbidding it. There was no evidence of threats or intimidation by any of the defendants, except that in one instance a workman who continued to work was threatened with violence by one of the defendants if he did not quit working.

Held, 1. Whilst workmen have a right to strike, and to combine together for that purpose in order to improve their own position, provided the means resorted to be not in themselves unlawful, yet the defendants had no right to induce other workmen, who were not members of the union and who desired to continue working, to leave their employment, or to endeavour to prevent the plaintiffs from getting other men to work for them, and for that purpose to watch and beset the places where the men happened to be, or to induce the plaintiffs' men to break their contracts with the plaintiffs, as these are actionable wrongs, and picketting and besetting are expressly made unlawful by s. 501 of the Criminal Code. *Lyons v. Wilkins* (1899), 1 Ch. 255, and *Charnock v. Court* (1899), 2 Ch. 35, followed.

2. The defendants who had participated in or counselled or procured the acts condemned were each individually liable for the whole amount of the damages suffered by the several plaintiffs in consequence of those acts: *Krug Furniture Co v. Berlin Union*, 5 O.L.R. at p. 469, but not for any damages caused by

themselves quitting work. Damages assessed against all the defendants found guilty at \$2,000, divided amongst the several plaintiffs, in proportions fixed by the judgment.

The property and assets of the union were also declared to be liable for the amount of the judgment and costs and the interim injunction made perpetual restraining the defendants from persuading, procuring or inducing workmen to leave the employ of the plaintiffs and from conspiring or combining to induce workmen not to enter plaintiffs' employ, also from besetting or watching places where the plaintiffs or any of their workmen or those seeking to enter their employ reside or carry on business or happen to be with a view to compel the plaintiffs or said workmen to abstain from doing anything they or any of them have a lawful right to do, or from persistently following them or any of them.

O'Connor and Blackwood, for plaintiffs. *Knott*, for defendants.

Cameron, J.]

ANDERSON v. DOUGLAS.

[June 13.

Contract—Evidence to vary written contract—Evidence proving terms of contract intentionally omitted from the writing—Statute of Frauds—Specific performance—Rectification.

Action for specific performance of an agreement in writing dated Feb. 14, 1898, by which the defendant agreed to purchase from the plaintiff certain lands containing 650 acres more or less excepting thereout certain rights of way for \$19,500.

Evidence was admitted on behalf of the defendant on the authority of *Alley v. Fisher*, 34 Ch.D. 367, to shew that the actual bargain verbally made between the parties contained: (1) Terms different from some of those in the writing; (2) A number of terms relating to matters not referred to in the writing.

There was no evidence of fraud, accident or mistake or of an intention, common or unilateral to embody the whole of the contract in writing, and parts of it were apparently left designedly in parol.

Held, that the Statute of Frauds in no way prevents either party from shewing that the writing on which the other insists is not the real agreement that was made between them, that there was, therefore, before the court a parol contract of which some only of the terms were evidenced in accordance with the require-

ments of the Statute of Frauds, and that the writing could not be enforced because it was shewn not to be the real agreement, and the real agreement could not be enforced because it was not in writing. Pollock on Contracts, 7th ed. 511; *Price v. Ley* (1863) 4 Giff. 235, and *Green v. Stevenson*, 9 O.L.R. 671, followed.

Plaintiff contended that, if the evidence disclosing terms not inserted in the writing was admissible, he could now amend his pleading and ask for a rectification of the agreement in accordance with the evidence and for specific performance of the agreement thus rectified, relying on *Martin v. Pycroft*, 2 De.G. M. & G. 785, and *Olley v. Fisher*, supra.

Held, distinguishing those cases, and following Fry on Specific Performance, p. 352; Pollock on Contracts, p. 510, 575; *Attorney-General v. Sitwell*, 1 Y. & C. Ex. at p. 593, *Davies v. Fitton*, 2 Dr. & Mar. 232; *May v. Platt* (1900), Ch. 616, and *Woolman v. Hearn*, 7 Ves. 211, that, before there can be rectification of an instrument, there must be clear evidence of a common intention that the instrument to be rectified should contain the whole contract and that the omitted terms were left out owing to fraud, accident or mistake. In other words, if the writing purports to contain all the terms of the bargain but omits some material part thereof and there was no common intention to put the whole bargain into writing, the document cannot be rectified. Specific performance refused.

Robson, for plaintiff. *Hoskin*, for defendant.

Macdonald, J.]

BATES v. CANNON.

[June 22.

Fraudulent preference—Assignments Act, R.S.M. 1902, c. 8, s. 41
—*Chattel mortgage—Exemptions.*

Action to set aside as fraudulent and void against creditors a chattel mortgage given by one James Speed to the defendant, for a past due indebtedness, less than sixty days before Speed made an assignment to the plaintiff for the benefit of his creditors. At the time of the giving of the chattel mortgage Speed was in insolvent circumstances to the knowledge of the defendant, and there was no doubt that the mortgage was void as against the plaintiff under s. 41 of R.S.M. 1902, c. 8. Some of the chattels covered by the mortgage, however, were such as would be

exempt under s. 29 of the Executions Act, from seizure under execution.

Held, following *Field v. Hare*, 22 A.R. 449, that the defendant was entitled to hold his mortgage as regards all goods mentioned in it which would be so exempt, and that the plaintiff was entitled to have the mortgage set aside as to the remaining goods.

Hudson and Noble, for plaintiff. *McKay*, for defendant.

Province of British Columbia.

SUPREME COURT.

Hunter, C.J.] PARROT v. CHEALES. [May 28.

Practice—County Court action transferred to Supreme Court.

The order transferring an action from the County Court to the Supreme Court takes effect as soon as pronounced.

W. N. Bole, K.C., for the application. *Kennedy*, contra.

Hunter, C.J.] REX v. LABOURDETTE. [May 28.

Criminal law—Concealing with intent to escape from prison—Attempt and intent—Plea of guilty, striking out.

Where the accused was indicted for “concealing himself with intent to escape from the penitentiary,”

Held, that as the criminal act consists in an attempt to commit an offence, doing something with intent to commit the offence is not necessarily sufficient to constitute an attempt.

Where the accused pleads guilty to a charge and it is disclosed that the indictment alleges only a fact which might or might not, according to the circumstances, be sufficient to prove an offence, the plea of guilty will be struck out.

McQuarrie, for the Crown. Prisoner undefended.

Wilson, Local J.] [June 8.

IN RE RELIANCE GOLD MINING & MILLING CO.

Land Registry Act, s. 89—Surface rights of mineral claim—Registration.

The grant from the Crown to the surface rights of a mineral

claim, being given in conjunction with the right to win the minerals thereunder, is not an interest which can be separately transferred by the grantee so as to secure registration under the Land Registry Act.

Lennie, for the applicant. District Registrar of Titles in person.

COUNTY COURT.

Howay, Co.J.]

RE NILS NILSON.

[June 11.

County Court—Official Administrator's Act—R.S.B.C. 1897, c. 146—Amendment Act, 1900, c. 27—Intestate Estates Act, R.S.B.C. 1897, c. 106.

The amendment of 1900, c. 27, to the Official Administrator's Act, was intended to obviate the necessity of applying under the Intestate Estates Act, for an order to administer the real estate of the deceased.

J. R. Grant, for the application.

Flotsam and Jetsam.

The omnipotence of Parliament has been often dilated upon by constitutional lawyers, but it has probably escaped their notice that when Her late Majesty, Queen Victoria, conferred the honour of Knighthood on the late Mr. Justice Day, she turned Day into Knight.

TRIOLET IN CURIA.

The judge was wide awake;
The counsel's speech was long,
His reasoning opaque.

—The judge was wide awake—
(A little nap to take
Would do no plaintiff wrong).
The judge was wide awake;
The counsel's speech was long.

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LIABILITY FOR MISREPRESENTATION.

The principle established by the case of *Collen v. Wright* (1857) 8 E. & B. 647, seems to be one of those developments of our mercantile law due to the exigencies of business. That every person assuming to act as the agent of another, should be held to impliedly warrant that he has the authority which he holds himself out to have, is only reasonable. Much of the business of the world is done through agents, the exact scope of whose authority it is often difficult for those dealing with them to ascertain; and business transactions would often be paralyzed, if there was a possibility that in bargains made with persons assuming to be agents for others, neither they nor their alleged principals would be bound. A person assuming to act as an agent may be reasonably supposed to know the nature and extent of his authority, and it is not imposing any undue liability on him, to hold that when he assumes to act as agent he also impliedly assumes a liability in damages to those who enter into transactions with him, on the faith that he is what he represents himself to be, in case that representation turns out to be untrue.

The principle is stated, by Mr. Justice Story in his commentaries on the Law of Agency, to be "a plain-principle of justice; for every person so acting for another, by a natural, if not by a necessary implication, holds himself out as having competent authority to do the act, and he thereby draws the other party into a reciprocal engagement." Ch. X., s. 364. And it was considered by their Lordships of the Judicial Committee of the Privy Council that *Collen v. Wright* had settled the law upon the subject in conformity with the view of Mr. Justice Story.

In *Collen v. Wright* a person representing himself to be agent of another person made a lease in the name of his alleged principal. It afterwards turned out that he had no authority to make

the lease, and the intended lessee sued the person who assumed to be agent for damages, and it was held by the Exchequer Chamber that there was a contract on the part of the pretended agent that he had authority, on which contract (he having since died) his representatives were liable.

As the later cases put it, such a transaction amounts to a warranty on the part of the agent that he has the authority of his alleged principal to do the act which he assumes to do, and if in fact he has not, then he is responsible in damages to the person whom he induces to act on the faith that he has the authority which he represents himself to have. *Collen v. Wright* was followed in *Pow v. Davis*, 30 L.J.Q.B. 257, and in *Spedding v. Nevell*, L.R. 4 C.P. 223, where the facts were similar; and the principle of the case was applied by the Judicial Committee of the Privy Council in *Cherry v. Colonial Bank of Australia*, L.R. 3 P.C. 24. In that case two directors of a company notified the company's bankers by letter that the manager of the company had authority to draw cheques on account of the company. These two directors did not form a majority of the directors so as to bind the company. On the faith of the letter the bank honoured the manager's cheques, and the company's account was thereby overdrawn; and it was held by the Judicial Committee of the Privy Council that although the directors had no power to give the manager authority to draw cheques on the company's account, yet they were personally liable in damages to the bank, on the ground that they had impliedly warranted the authority of the manager.

The principle was further applied in the case of *Richardson v. Williamson*, L.R. 6 Q.B. 276. There the plaintiff lent £70 to a building society and received a receipt signed by two directors certifying that the plaintiff had deposited £70 with the society for three months, certain to be repaid with interest after fourteen days' notice. The society had no power to borrow money; but the receipt was held by the court to be a representation on the part of the directors that the society had power to borrow money, and rendered them personally liable in damages for

breach of an implied warranty on their part, that the society had power to borrow.

Very similar in its facts to *Cherry v. Colonial Bank* was *Weeks v. Propert*, L.R. 8 C.P. 437. There the defendant, a director of a company, was party to the issuing of an advertisement stating that the company was prepared to receive proposals for loans on the security of debenture mortgages. The plaintiff in response to the advertisement offered to lend £500, which was accepted, and a debenture therefor was issued to the plaintiff, which was subsequently declared by a court of law to be invalid, as being beyond the borrowing powers of the company. The advertisement was held to be an implied warranty that the company had the necessary borrowing powers, and that the debenture to be issued would be valid and binding on the company, which the defendant was personally bound to make good; and *Chapleo v. Brunswick Building Society*, 6 Q.B.D. 706, and *Fairbanks v. Humphreys*, 18 Q.B.D. 54, are decisions to the same effect. But where a company had power and were bound to issue the debentures contracted for, but did not do so, in such a case the directors were held to incur no personal liability for breach of warranty because the default was the company's: *Elkington v. Hunter* (1892), 2 Ch. 452.

In *Rashdall v. Ford*, L.R. 2 Eq. 750, the plaintiff being desirous of investing money in railway bonds applied to the secretary of a railway company, who wrote offering him a bond of the company for £1,500, and stated that the company were not yet in a position to issue permanent debentures, but that they expected to be able to do so in four or five months' time. The plaintiff advanced his money on the security of the bond offered to him: with the bond, which was signed by the secretary, was sent a prospectus shewing that the company had been incorporated and that three persons named were directors. The bond proved to be invalid; and the action was brought against the directors, but the bill contained no obligations of fraud, misrepresentation of fact, or misapplication of the money, nor was there any allegation that the directors knew anything about the transaction, and the secre-

tary was not a defendant. In these circumstances a demurrer to the bill for want of equity was allowed. But in giving judgment, Wood, V.C., made this observation: "Now, if there had been any misrepresentation of a matter of fact in this case, the result would have been undoubted; as, for example, if the company having power to issue debentures to a certain amount, and having exhausted that power, the directors had stated that they still had power to issue debentures, they would then have stood in the position of being obliged to make good their representation."

The representation of the secretary as to the validity of the bond the learned Vice-Chancellor regarded as a representation of a matter of law, and as to that he said: "It seems to me impossible to extend the principle of relief arising out of misrepresentation, to a statement of law which turns out to be an incorrect statement."

The cases of *Cherry v. Colonial Bank of Australia*, *Richardson v. Williamson*, *Chapleo v. Brunswick Building Society*, *Fairbanks v. Humphrey*, it will be noticed, were not misrepresentations of authority to act as agent, but misrepresentations of the powers of the admitted principal. It will thus be seen that the doctrine of *Collen v. Wright* is not confined to cases of misrepresentations of authority to act as agent.

An unsuccessful attempt was made in *Dickson v. Reuters Telegram Co.*, 2 C.P.D. 62; 3 C.P.D. 5, to extend the principle of *Collen v. Wright* so as to make a telegraph company liable for misdelivering a message to the plaintiff which he acted on to his damage, supposing it to be intended for him. It was contended that the defendant, by delivering the message to the plaintiff, had impliedly warranted that they had been employed to deliver the message to him. Bramwell, L.J., said: "The general rule of law is clear, that no action is maintainable for a mere statement, although untrue, and though acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it. . . . *Collen v. Wright* establishes a separate and independent rule, which, without

using language rigorously accurate, may be thus stated: If a person requests, and by asserting that he is clothed with the necessary authority, induces another to enter into a negotiation with himself, and a transaction with a person whose authority he represents he has, in that case there is a contract by him that he has the authority of the person with whom he requests the other to enter into a transaction." The case was also distinguished from *Collen v. Wright* because there was no contract induced by the defendants by the alleged misrepresentation; but it is doubtful whether that is a real ground of distinction.

Where the representations of directors, though erroneous, are made good by the company they represent, and the person dealing with them is not put to any loss by reason of such misrepresentation, no liability attaches to the directors. This may seem an almost self-evident proposition, but it was the point nevertheless carried to the Court of Appeal in *Beattie v. Ebury*, L.R. 7 Ch. 777. There three directors of a railway company opened, on behalf of the company, an account with a bank and sent a letter signed by the three requesting the bank to honour cheques signed by two of the directors and countersigned by the secretary. The account having been largely overdrawn by means of such cheques, the bank sued the company and recovered judgment against it for the amount of the overdraft, and being unable to collect the amount by execution, the bank then sued the directors on the letter, as being a representation that they had power to overdraw the account; but the Court of Appeal held that this was not a representation of fact, but of law, and even if it were such a false representation as the directors were bound to make good, yet, the bank had no claim against them, since it had been able to enforce the same remedies against the company as if the representation had been true.

It was decided by Kekewich, J., in *Halbot v. Lens* (1901) 1 Ch. 344, that a person who contracts as agent on behalf of an alleged principal without authority is not liable on an implied warranty if the other contracting party knows at the time of the transaction that the agent is acting without authority; thus, if

the person assuming to act as agent, at the time of so doing expressly disclaims having any present authority he incurs no liability. In that case the defendant had signed a creditor's composition agreement on behalf of his own wife, and one Clarke, as creditors, both of whom afterwards repudiated his authority. At the time he signed he thought he had power to sign for his wife, but as to Clarke it was known to the plaintiff that he had no authority to act, but it was hoped that Clarke would ratify the agreement. While, therefore, the defendant was held bound by *Collen v. Wright* to make good the representation as to his wife, he was held not to be liable in respect of his assuming to act for Clarke. In this case Kekewich, J., points out that the supposed necessity of some wrong, or omission of duty on the part of the person assuming to act as agent in order to make him liable which, in *Smout v. Iberry*, 10 M. & W. 1, the Court thought to be an essential ingredient, must be taken to have been negated by the latter decision of *Collen v. Wright*.

The principle of *Collen v. Wright* has sometimes been supposed to be confined to cases of misrepresentations of agency: but it is obvious that the principle on which a person is held liable to make good such representations applies equally to any other representations of fact which one person makes to another as an inducement to that person to alter his position. The misrepresentation of agency is the misrepresentation of a fact, and other facts may also be misrepresented as an inducement to others to do or refrain from doing something to their damage, for which the person making the representation appears to be liable.

A mere misrepresentation, innocently made, does not involve the person making it in liability for deceit to a person who acts upon it to his damage, as was determined by the House of Lords in *Peak v. Derry* (1889) 14 App. Cas. 337; but when the representation of any fact is made by a person to another in a matter of business, on the faith of which it is known and intended the person to whom it is made, shall or will act, and he thereby incurs a loss or liability, which but for such misrepresentation he would not have incurred, there seems no good reason why the

person making the representation should not be personally liable for the damage so occasioned. It was said by the Court of Appeal in *Oliver v. The Bank of England* (1902) 1 Ch. 610, that the rule established by *Collen v. Wright* is unaffected by *Peak v. Derry*; and it was there held that *Collen v. Wright* applies to any case when a person professing to have authority as agent, induces another to act in a matter of business on the faith of his having that authority, but it is questionable if it does not go farther, as has been already pointed out. Some of the cases already referred to shew that the case has been held to apply to misrepresentations of other facts, than that of authority to act as agent. Neither does it seem necessary in order to found liability, that the person to whom the misrepresentation is made should thereby be induced to enter into any contract, as seems to have been assumed in *Dickson v. Reuters Telegram Co.*, supra; on the contrary it seems enough that the person to whom the misrepresentation is made is thereby induced to alter his position, or give up some right, or give, or do, something amounting to a valuable consideration, as the known and intended result of such misrepresentation. See the observations of Williams, L.J., in *Oliver v. Bank of England*, supra; (1901) 1 Ch. 682; (1902) 1 Ch. 611. S. C., sub nom *Sharkey v. Bank of England* (1903) A.C. 114. In that case Sharkey & Co., stockbrokers, presented to the Bank of England a power of attorney authorizing them to transfer consols. The brokers believed at the time that the power was genuine, but it turned out to be a forgery, and it was held by the House of Lords that the brokers must be taken to have warranted the genuineness of the power under which they claimed to act, and were liable to make good to the bank the loss it had sustained by improperly permitting a transfer pursuant to the power.

In *Bank of England v. Cutler*, 98 L.T. 336; (1908) 2 K.B. 108, a woman was introduced to a stockbroker as the holder of India stock, which she desired to transfer, and the stockbroker attended with the woman at the transfer department of the Bank of England where she made a transfer in the books of the stock

standing in the name of a person whom she was in fact personating. The stockbroker identified her to the bank authority as being the holder of the stock. Here it will be seen it was not a misrepresentation as to agency, but a misrepresentation of another fact, namely, the identity of the person claiming to make the transfer with the true owner, and it was held by the Court of Appeal that the broker was liable to make good to the bank the value of the stock so transferred, on it subsequently being discovered that the person identified was not really the owner. In this case an attempt to escape liability on the ground that the defendant had merely acted as a witness failed. The decision in this case is based on *Barclay v. Sheffield* (1905) A.C. 392; 93 L.T. 83, which again was based on *Sharkey v. Bank of England*, supra, which was based on *Collen v. Wright*; here, too, it may be remarked, no contract was made by the bank acting on the representation; but it did something whereby it suffered loss on the faith of it, which the person making the representation was held bound to make good.

In *Collen v. Wright* Willes, J., said: "The fact of entering into the transaction with the professed agent as such, is good consideration for the promise," a remark which was afterwards cited with approval by Lord Davy in *Sheffield v. Barclay*, supra; so in the *Cutler* case the bank's acting on the representation of the broker that the person identified was the true owner, would seem to be a good consideration for the implied warranty that the representation was true.

In view of *Cherry v. The Colonial Bank of Australia*, supra, and the *Bank of England v. Cutler*, supra, it may perhaps be reasonably doubted whether *White v. Sage*, 19 Ont. App. 135, was correctly decided. In that case the defendant introduced to the plaintiff a stranger having a cheque purported to be signed by one George Rice, the stranger desired to get the cheque cashed, and the defendant assured the plaintiff that it was "all right," and on the faith of that representation the plaintiff cashed the cheque, which proved to be a forgery. The jury found, as a fact, that the defendant had not fraudulently represented the cheque

to be all right, but he made the representation without knowing it to be true or false. On this state of facts the Court of Appeal considered, and so held, that the defendant was not liable, conceiving the case to be one of innocent misrepresentation covered by *Peak v. Derry*. But it may be noticed that the representation was made for the express purpose of inducing the plaintiff to cash the cheque, and his doing so, it would seem, was a valuable consideration for an implied warranty on the part of the defendant that his representation was true.

There are no doubt passages in the reasons given for the decision in *Peak v. Derry* which conflict with this view, but it is questionable whether they have not been modified by the later cases above referred to. While it would undoubtedly be hard to make a man responsible in damages to persons acting on representations innocently made, which turn out to be false, where they are made without any express object of inducing the course of action which results in damage, still the case is very different where the representation is made for the express purpose of inducing the course of action which results in damage to the person relying on it. At the same time it must be confessed the line would in many cases be hard to draw between cases where liability should attach and where it should not. For instance, if a man tells another he may safely walk over a bridge which he knows to be unsafe, and the person acts on his representation and is injured, the person making the representation would seem to be liable, but if not knowing whether it is safe or not, he says it is safe and it proves to be unsafe, then that might be said to be a mere expression of opinion for the correctness of which he would not be held liable. But can a man who positively affirms that a cheque is "all right," for the purpose of inducing another to cash it, be considered as merely expressing an opinion? He is positively affirming a fact to be true, as an inducement to a course of action, and in such a case it seems not unreasonable to hold that he warrants the truth of the statement.

In *Le Lievre v. Gould* (1893) 1 Q.B. 491, Lindley, L.J., refers to this conflict of opinion and considers that it has been

finally and definitely settled by *Peak v. Derry* that an action for misrepresentation will not lie except where it is made fraudulently; but it may well be doubted whether in view of *Cherry v. The Colonial Bank of Australia*, *Sharkey v. Bank of England*, *Barclay v. Sheffield*, and *Bank of England v. Cutler*, supra, and *Bank of Ottawa v. Harty*, hereafter referred to, that point can now be said to be so conclusively settled as he assumed.

The question of the measure of damages for which an assumed agent in such circumstances is liable on a breach of his implied warranty was discussed in the case of *In re National Coffee Palace Co.*, 24 Ch. D. 367. There a broker had by mistake subscribed for shares on behalf of a customer in one company instead of another, which had been named by the customer. The shares were allotted to the customer, who repudiated them, and they had in fact no marketable value. The broker was, nevertheless, held liable for the par value of the shares subscribed, it being held that the measure of damage was what the company would have gained had the contract been carried out.

This was followed in *Meek v. Wendt*, 21 Q.B.D. 126. In that case the plaintiff had a claim against an insurance company, and the defendants, the agents of the company in England, believing in good faith that they had the power, entered into an agreement with the plaintiff whereby on behalf of the company they agreed to pay £300 in settlement of his claim. The company having repudiated the settlement, it was held by Charles, J., that the measure of damages was the £300, and not merely the expenses to which the plaintiff had been put by entering into the negotiation.

In *Hughes v. Graeme*, 33 L.J.Q.B. 336, the defendant, who was agent of the plaintiffs, also assumed as agent of certain other persons to sell certain goods to the plaintiffs. The defendant's authority to sell was repudiated, and it was held that he was liable to the plaintiffs for all the damages which they had sustained by breach of the contract. This included the costs of an unsuccessful action to enforce the contract, and the difference between the price contracted to be paid and the value of the

goods, taking into account all mercantile circumstances affecting the value, e.g., in this case, the fact that the goods might have been exported free of duty to America.

In the recent case of *Salvesen v. Oscar*, 92 L.T. 575, (1905) A.C. 302, however, it was held that the plaintiff is not entitled to recover prospective profits, but merely the loss actually sustained. Where a person assuming to be agent for another orders work to be done, and says that he will see the person doing the work paid, that does not amount to a representation of authority to act as agent, but is a mere contract to answer for the debt of another, and is void if not in writing, as is exemplified by the case of *Mountstephen v. Lakeman*, L.R. 7 Q.B. 196.

On the grounds of public policy the principle laid down in *Collen v. Wright* is held not to be applicable to public functionaries acting for the Crown. Therefore, where the plaintiff alleged that the defendant, a public functionary, had misrepresented that he had power to engage the plaintiff as a servant of the Crown for three years, and the plaintiff after entering the employment, had been dismissed before the three years were up, it was held that the doctrine of implied warranty of authority is not applicable to a public servant. *Dunn v. Macdonald* (1896) 1 Q.B. 401.

The case of *Collen v. Wright* was recently considered in Ontario in *The Bank of Ottawa v. Harty*, 12 O.L.R. 218, the facts of which were somewhat peculiar. One McEwan being in possession of a cheque drawn by the Lake Superior Corporation on the Morton Trust Co., of New York, handed it to Harty to collect. Harty delivered it to the Bank of Ottawa, having McEwan's indorsement. He signed his name on the back but "without recourse." The cheque was sent to New York for collection and was paid on presentation, and the amount remitted to the Bank of Ottawa, who paid it over to Harty, who in turn paid it to McEwan, less a small sum which McEwan owed him. The New York company subsequently discovered that the indorsement made by McEwan was made without authority, and they called on the Bank of Ottawa to refund, which they did.

The bank then claimed to recover the amount from Harty on an implied warranty that the indorsement was genuine. It was not proved at the trial that the indorsement was a forgery, or that McEwan had in fact no authority to indorse it, but it did appear that McEwan had been indicted for forging the indorsement, and had been acquitted. Boyd, C., in these circumstances thought the plaintiffs could not recover, but the Divisional Court ordered a new trial on the question of forgery, holding that in case the indorsement were in fact forged the defendant would be liable. This case seems to be opposed to *White v. Sage*, supra.

GEO. S. HOLMESTED.

NOTE.—The subject of the foregoing article has been recently before the Supreme Court of Canada: see supra, pp. 491-2.—Ed. C.L.J.

The Government Service of Canada has recently sustained a distinct loss in the death of Mr. F. A. McCord, Law Clerk of the House of Commons and Parliamentary Counsel to the Government. Mr. McCord was an LL.B. of Laval University, and a member of the Quebec Bar; he did not, however, practice, but immediately entered the public service, in which he continued for twenty-four years, until his death. He was recognized as a man of extensive general knowledge, with a special aptitude for the important and technical work required of a parliamentary draftsman. He was particularly well informed upon the constitutional history of Canada, being also a writer to some extent upon this subject. It is but a short time since we had occasion to give unstinted praise to his index to the Revised Statutes, a subject requiring special qualifications, and but rarely found. Cut off suddenly, in the midst of a useful life, he has left an enviable record.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

WILL—CONSTRUCTION—SUBSTITUTIONARY GIFT—WORDS OF FUTURETY—CHILD DEAD AT DATE OF WILL.

In re Cope, Cross v. Cross (1908) 2 Ch. 1. In this case a testator gave his residuary estate in trust for all his children who attained 21 in equal shares "provided always that if any child of mine *shall die* in my lifetime having a child or children who shall survive and being a son or sons shall attain 21 years, or being a daughter, or daughters, shall attain that age, or marry under that age, then, and in every such case, the last mentioned child or children shall take, (and if more than one, equally between them), the share which his, her or their parent *would have taken* . . . if such parent had survived me (subject, nevertheless, to the proviso hereinafter contained) provided always that if any child of mine shall die in the lifetime of my wife, having a husband or wife who shall survive her or him, then I declare that on the decease of my said wife, the income of the share of any deceased child of mine shall go and be payable to such husband or wife of such deceased child of mine." At the date of the will two of the testator's children were dead leaving a wife and children, and husband and child respectively surviving them, and the question was whether these children and the surviving wife and husband were entitled to the benefit of the above provisos. Eady, J., thought that they were; but the Court of Appeal (Cozens-Hardy, M.R., and Buckley, and Kennedy, L.JJ.) differed from him, and held that the will must be construed according to its grammatical meaning, and that according to that meaning it was plain that the words "shall die" were referrable to a death after the date of the will, and could not be extended to include those who had died previously to its date; neither the children nor the husband and wife of the testator's children who were dead at the date of the will therefore took any benefit under the provisos. See *In re Lambert*, *infra*.

MORTGAGE—POWER OF SALE—NOTICE REQUIRING PAYMENT—DEFAULT FOR THREE MONTHS—CONVEYANCING AND LAW OF PROPERTY ACT 1881 (44-45 VICT. C. 41) SS. 19, 20—(R.S.O. C. 121, SS. 20, 22.)

In *Barker v. Ilingworth* (1908) 2 Ch. 20, after a mortgage

was in default a notice of exercising the power of sale was served under the provisions of 44-45 Vict. c. 41, ss. 19, 20, (see R.S.O. c. 121, ss. 20, 22), and it was contended on behalf of the plaintiff, the mortgagor, that the power could not be exercised until three months had elapsed from the time fixed for payment by the notice, but Eady, J., held that it was exercisable at any time after default in payment according to the notice, and the plaintiff's motion to restrain the sale was accordingly dismissed.

PRACTICE—FLOATING SECURITY—DEBENTURE HOLDER—SECURITY NOT IN DEFAULT WHEN ACTION COMMENCED—DEFAULT AFTER ACTION—RECEIVER.

In re Carshalton Park (1908) 2 Ch. 62. In this case one Turnell, being a debenture holder of a company, and as such having a floating security over all the company's assets, before his debenture was in default, commenced his action against the company, and moved for the appointment of a receiver and manager, his debenture not being in default at the time of the motion, the application was refused. A month afterwards the time for payment arrived and the plaintiff's debenture was not paid and he gave notice of another motion for the appointment of a receiver and manager, and on the same day Graham, another debenture holder whose debenture was overdue and unpaid, commenced a similar action and also gave notice of motion for the appointment of a receiver. The motions came on to be heard together, and Graham contended that the order should be made on his application because at the time Turnell issued his writ his debenture was not in default, and he had no cause of action; but Warrington, J., held that although the court might not be able to grant a receiver in favour of a plaintiff whose security was not in default, still a plaintiff having a floating security had for the purpose of "crystallising his security" a right of action, even before default, and that on a default taking place, even pendente lite, a receiver might properly be appointed, and he accordingly made the appointment on Turnell's application.

ADMINISTRATION—WILL—GIFT OF SHARE OF RESIDUE TO DEBTOR OF TESTATOR WHOSE DEBT IS NOT DUE—RIGHT OF EXECUTOR TO RETAIN LEGACY TO ANSWER FUTURE ACCRUING DEBT.

In re Abrahams, Abrahams v. Abrahams (1908) 2 Ch. 69 deals with a point of some interest. A testator gave a share of

his residue to a person who was his debtor, but the debt was payable by instalments, some of which were not due, and the question Warrington, J., was called on to decide was, whether the executor could properly retain out of the legatee's share of the residue a sum sufficient to answer the future accruing instalments of the debt due by the legatee to the testator. This question the learned judge answers in the negative.

**TENANT FOR LIFE—REMAINDERMAN—TRUST FOR SALE OF REALTY
—POSTPONEMENT OF SALE—RENTS AND PROFITS.**

In re Oliver, Wilson v. Oliver (1908) 2 Ch. 74, Warrington, J., holds that when real and personal estate is given on trust for sale and the proceeds are to be held in trust for a person for life and then for others, and the sale without any impropriety is postponed, the tenant for life is, until the sale, entitled to the rents and profits of the realty.

**WILL—SPECIFIC LEGACY—SHARES IN BANK—MISDESCRIPTION OF
SUBJECT OF LEGACY—EXTRINSIC EVIDENCE.**

In re Jameson, King v. Winn (1908) 2 Ch. 111. In this case a testatrix by her will, made in 1902, bequeathed to two legatees "all my shares in the Wensleydale and Swaledale Bank." At the date of the will and at the date of her death she had no such shares. In 1899 she held 25 such shares, but the Wensleydale and Swaledale Bank was then taken over and amalgamated with Barclay & Co., Limited, and the testatrix received in exchange for her shares in the Wensleydale and Swaledale Bank 25 shares in Barclay & Co., Limited, which she held at the date of her will and at the time of her death, and had no other bank shares. In these circumstances, Eve, J., held that the 25 shares of Barclay & Co. passed to the legatees of the Wensleydale and Swaledale bank shares.

**WILL—CONSTRUCTION—WORDS OF FUTURITY—SUBSTITUTIONAL
GIFT—GIFT TO CHILDREN OF NEPHEW "IN CASE NEPHEW
SHALL DIE IN MY LIFETIME"—NEPHEW DEAD AT DATE OF WILL.**

In re Lambert, Corns v. Harrison (1908) 2 Ch. 117. This case involves a very similar point to that discussed *In re Cope, Cross v. Cross*, *supra*. Here a testatrix gave the residue of her estate in trust for all my nephews and nieces who shall be living at my death, to be equally divided between them. Provided

always that if any nephew or niece of mine shall die in my lifetime having a child or children who shall survive me . . . such child or children shall take the share which his or her parent would have taken . . . if such persons had survived me." Eve, J., came to the same conclusion as did Eady, J., *In re Cope*, that the child of a nephew who survived the testatrix but whose parent was dead at the date of the will, was entitled to share in the residue. This decision appears to have been given on 2nd April last, but before the decision of the Court of Appeal, *In re Cope*, and it would therefore seem that the conclusion of Eve, J., was erroneous.

PATENT—SALE OF PATENT—PART OF PURCHASE MONEY TO BE PAID IN ROYALTIES—ASSIGNMENT BY PURCHASER—VENDOR'S LIEN—COSTS, AS AGAINST DEFENDING AND NON-DEFENDING DEFENDANTS.

Dansk Rekylriffel, etc. v. Snell (1908) 2 Ch. 127 was an action by the vendor of a patent against the purchaser and his assignees to recover part of the consideration. The defendant, Snell, purchased the patent from the plaintiff for £5,000 cash and the payment of certain royalties, it being agreed that the minimum royalties should be a specific sum per annum, the royalties being payable half yearly. The patents were assigned to Snell absolutely, and Snell subsequently sold his interest in them to the defendants with notice of the arrangement with the plaintiffs. The defendant company paid to the plaintiffs part of the minimum royalties agreed to be paid, and thereafter Snell wrote to the plaintiffs repudiating the agreement, whereupon the plaintiffs commenced the action against the defendant company and Snell claiming as against Snell the full amount of minimum royalties as damages for breach of the agreement, and as against the defendant company a lien on the patents for the unpaid minimum royalties. The defendant company contended that the effect of the plaintiffs' action was to put an end to the contract, and therefore they were not entitled to a vendor's lien, but Neville, J., declined to accede to that argument and held that the plaintiff was entitled as against the defendant company to a lien on the patents for the unpaid royalties, and as against the defendant Snell to damages for breach of the agreement. Snell did not defend, and judgment was obtained against him on motion, the company defended and the action was carried to

trial as against it; and in disposing of the costs, Neville, J., directed that the taxing officer should distinguish between the costs attributable to the defendants jointly and those attributable to each separately, and that the defendants should respectively pay the costs as so certified. This is a departure from the ordinary rule. Usually it is considered that where the wrongful act of the defendants occasioned the action they should all pay the plaintiffs' costs of obtaining redress.

WEIGHTS AND MEASURES—VEHICLE CARRYING COAL—PERSON IN CHARGE OF VEHICLE—LIABILITY OF CARTER FOR SHORT WEIGHT.

Paul v. Hargreaves (1908) 2 K.B. 289. By the Weights and Measures Act, 1889, it is provided that "If it appears to a court of summary jurisdiction that any load, sack, or less quantity (of coal) so weighed is of less weight than that represented by the seller, the person selling or keeping or exposing the coal for sale, or the person in charge of the vehicle, as the case may be, shall be liable to a fine not exceeding £5." The defendant was in charge of a vehicle from which coal of less weight than that represented by his employer was being delivered to the purchaser, but he was merely a carter and there was no evidence that he had any knowledge that the weight was less than that represented. On a case stated the Divisional Court (Lord Alverstone, C.J. and Ridley, and Darling, JJ.) held that the defendant was not liable and that in order to constitute an offence on his part that it was essential that it should be established that he had a guilty knowledge.

SHIPPING—GENERAL AVERAGE—DAMAGE TO CARGO FROM UNLOADING IN ORDER TO REPAIR SHIP.

In *Hamel v. Peninsular & Oriental Navigation Co.* (1908) 2 K.B. 298 the plaintiff's cargo which was being carried on the defendants' vessel was unloaded for the purpose of enabling damage to the vessel, arising from the ordinary perils of navigation, to be repaired. In the process of unloading the cargo which had never been in peril, suffered damage, and the question in the action was whether the plaintiff was entitled to general average contribution from the ship owners and Lord Alverstone, C.J., who tried the action held that he was not and dismissed the action.

DEFAMATION—LIBEL—DEFENCE OF FAIR COMMENT—MISDIRECTION—NEW TRIAL.

Hunt v. Star Newspaper Co. (1908) 2 K.B. 309 was an action for libel in which the defendants set up a defence of justification and fair comment. The alleged libel imputed to the plaintiff misconduct in the discharge of his duties as a deputy returning officer at a municipal election. Lawrence, J., tried the action, and the jury found a verdict for the plaintiff for £800. The defendants moved for a new trial in the ground that the learned judge misdirected the jury by telling them that it was for the jury to decide whether it was a *bonâ fide* and fair comment, or whether it was comment which tended to charge the plaintiff with improper conduct: and also by telling them that if they came to the conclusion that the words complained of were libels and were such as would have a tendency to prejudice the plaintiff in his position, they must return a verdict for him. The Court of Appeal (Cozens-Hardy, M.R. and Moulton, and Buckley, L.J.J.) considered the objections to the charge well founded and granted a new trial as it was apparent that the defence of fair comment as a separate issue had not been properly left to the jury.

SUBPOENA DUCES TECUM—SEALED PACKET—DEPOSIT IN BANK—OBLIGATION OF BANKER TO PRODUCE SEALED PACKET DEPOSITED WITH HIM.

The King v. Daye (1908) 2 K.B. 333. In this case, for the purpose of extradition proceedings, a subpoena duces tecum was issued and served on a bank with which a certain sealed packet alleged to contain a chemical formula for the manufacture of diamonds had been deposited by the alleged criminal, upon the terms that it was not to be delivered up without the consent of the depositor and a third person. The bank's representative objected in these circumstances to producing the packet under the subpoena duces tecum and raised the question whether a sealed packet such as that in question could be said to be "a document." On a motion to commit the bank's representative for disobedience to the subpoena it was held by the Divisional Court [(Lord Alverstone, C.J., and Ridley and Darling, J.J.)] that the packet was a document, and as such producible under the subpoena, and that the circumstances of the deposit did not afford any excuse for its non-production, and the attachment was granted, but ordered to lie in the office for a month.

PROHIBITION—INFERIOR COURT—ALTERNATIVE MODES OF PROOF—
UNDERTAKING TO RELY ONLY ON PROOF OF CAUSE ARISING
WITHIN JURISDICTION.

Josolyne v. Roberts (1908) 2 K.B. 349 was an application for a prohibition to the Mayor's Court. The action was brought on a promissory note which was payable at an address within the city of London. Neither plaintiff nor defendant resided in the city, nor did any part of the cause of action arise there, except that the presentment at the address named was, unless waived, necessary to render the defendant liable. On the plaintiff undertaking not to rely on a waiver of presentment, the motion was refused by Channell and Sutton, JJ.

SAVAGE DOG—KEEPING A KNOWN VICIOUS ANIMAL—SERVANT CAUSING DOG TO BITE—LIABILITY OF MASTER—REMOTENESS OF DAMAGE.

Baker v. Snell (1908) 2 K.B. 352 was an action brought to recover damages for injury sustained through the bite of the defendant's dog. The dog was known to be vicious and was entrusted to the custody of the defendant's man servant, whose duty it was to let the dog out early in the morning and then chain it up again before the defendant and his maid servants came downstairs. On the occasion in question the man servant brought the dog into the kitchen where the plaintiff, a maid servant, was, and said: "I will bet the dog will not bite any one in the room." He then let the dog loose and said: "Go it Bob," and the dog flew at the plaintiff and bit her. It had previously bitten the plaintiff and other persons to the defendant's knowledge. The County Court judge who tried the action held that the act of the man servant was an assault, for which the defendant, his master, was not liable, and dismissed the action; but the Divisional Court (Channell and Sutton, JJ.) came to the conclusion that the act of the man servant was not intentionally malicious, in which case the master would not have been liable, but was a foolish and wanton act done in neglect of his duty to keep the dog safe, for which the defendant, his master, was responsible; but that this was a question of fact which ought to be left to a jury, and a new trial was therefore ordered.

SHIP—BILL OF LADING—CONSTRUCTION—"PORT INACCESSIBLE BY ICE"—EJUSDEM GENERIS—"ERROR IN JUDGMENT" OF MASTER.

In *Tillmann's v. Knutsford* (1908) 2 K.B. 385 the Court of

Appeal (Williams, Farwell and Kennedy, L.J.J.) has affirmed the judgment of Channell, J. (1908) 1 K.B. 185, noted ante, p. 226. An additional point to those noted there seems to have been raised on the appeal, viz., as to whether the owners were liable on bills of lading signed by the time charterers "for captain and owners." Farwell and Kennedy, L.J.J., held that they were, but Williams, L.J. was doubtful.

SOLICITOR—BILL OF COSTS—FORM OF BILL OF COSTS—SOLICITORS' ACT 1843 (6-7 VICT. c. 73) s. 37—(R.S.O. c. 174, s. 34.)

In *Cobbett v. Wood* (1908) 2 K.B. 419 the Court of Appeal (Barnes, P.P.D., and Moulton and Farwell, L.J.J.) has reversed the decision of Pickford, J. (1908) 1 K.B. 590 (noted ante, p. 277) on the ground that the bill of costs should have included not only the extra costs claimed but also the items of the bill taxed and allowed between party and party, and that consequently there had been no proper delivery of a bill on which the action could be brought.

LIFE INSURANCE—STATEMENT AGREED TO BE BASIS OF CONTRACT—NON-DISCLOSURE OF MATERIAL FACTS—ABSENCE OF FRAUDULENT INTENT—AVOIDANCE OF POLICY.

Joel v. Law Union, etc., Ins. Co. (1908) 2 K.B. 431. This was an action on a policy of insurance on the life of one Robina Morrison. On the application for the insurance the insured signed a declaration that the statements made in her application were true and were to form the basis of the contract. Subsequently, but before execution of the policy, she was interrogated on behalf of the company (1) as to whether she had ever suffered from mental derangement, and (2) as to the names of any doctors she had consulted. She answered the first question in the negative, as the jury found, without fraud, and in answering the second she omitted to disclose the name of a doctor whom she had consulted for nervous depression, but as the jury found she not fraudulently but foolishly concealed the fact. At the same time she signed a further declaration that her answers were true, but this declaration did not state that her answers were to form part of the basis of the contract. The policy did not refer to the proposal or the second declaration. The assured subsequently committed suicide. She had, prior to the application for insurance, suffered from acute mania, but the jury found she was ignorant of the fact, and they also found

that the name of the doctor she had consulted was material for the defendants to know, but that the insured was not aware that it was material. In these circumstances Lord Alverstone, C.J., held that the plaintiff could not recover, and that although the defendants were not entitled to rely on the answers made to the question on the second occasion, by the insured, as forming part of the basis of the contract, yet that the defendants were entitled to revoke the policy on the ground that as to the question of mental derangement the insured had innocently misrepresented a material fact, and in not disclosing the name of the doctor consulted by her, she had innocently concealed a material fact, and that the defendants were entitled to revoke the policy even after the death of the insured, because the knowledge of the misrepresentation and concealment of material facts did not reach them till after the death, and the defendants submitting to repay the premiums received, he ordered the policy to be delivered up to be cancelled.

SETTLEMENT—ESTATE TAIL—DISENTAILING DEED—PROTECTOR—
THREE PROTECTORS APPOINTED BY SETTLOR—RIGHT OF SUR-
VIVING PROTECTOR TO ACT—FINES AND RECOVERIES ACT 1833
(34 WM. IV. c. 74) ss. 22, 32—(R.S.O. c. 122, s. 20).

Cohen v. Bailey-Worthington (1908) A.C. 97 was known in the court below as *Re Bailey-Worthington & Cohen*. The question involved in it was whether the assent of a sole survivor of three protectors of a settlement was sufficient to give effect to a disentailing deed. The Court of Appeal (1908) 1 Ch. 25 (noted ante, p. 144) held that it was, and the House of Lords (Lord Loreburn, L.C. and Lords Macnaghten, Robertson, Atkinson and Collins) have affirmed that decision.

SHIP—CHARTER-PARTY—LAY DAYS—EXCEPTION OF SUNDAYS
AND HOLIDAYS—LOADING DONE ON HOLIDAYS—IMPLIED AGREE-
MENT—DESPATCH MONEY—DAYS SAVED.

In *Nelson v. Nelson* (1908) A.C. 108 the House of Lords (Lord Loreburn, L.C. and Lords Halsbury, Macnaghten and Atkinson) have been unable to agree with the Court of Appeal (1907) 2 K.B. 705 (noted ante, vol. 43, p. 774). The action was to recover despatch money for time saved in loading a ship. The charter-party provided that "seven weather working days (Sundays and holidays excepted)" should be allowed by the

ship owners to the charterers for loading and for each clear day saved in loading the charterers were to be paid or allowed £20. The loading was continued during two holidays and the question was whether these two days were to be accounted as "days saved." The Court below held that they were not (Moulton, L.J., dissenting), but the House of Lords held that in the absence of any evidence of any agreement to the contrary, under the charter-party the holidays on which work was done must be considered as "days saved" for which despatch money was payable.

SHIP—CHARTER BY DEMISE—"OWNER"—LIMITATION OF LIABILITY—MERCHANT SHIPPING ACT 1894 (57-58 VICT. c. 60) ss. 503, 504.

Jackson v. SS. "Blanche" (1908) A.C. 126 may be briefly noticed. The question was whether charterers to whom a ship is demised are owners and as such entitled to the benefit of the limitation of liability prescribed by s. 503 of the Merchants Shipping Act 1894. Deane, J., held that they were not; but the House of Lords reversed his decision.

CHEQUE—FORGED INDORSEMENT—PAYEE—FICTITIOUS PAYEE—BELIEF OF DRAWER—BILLS OF EXCHANGE ACT 1882 (45-46 VICT. c. 61) s. 7(3)—(R.S.C. c. 119, s. 21(5).)

In *North & South Wales Bank v. Macbeth* (1908) A.C. 137 the House of Lords (Lord Loreburn, L.C., and Lords Robertson and Collins) have affirmed the judgment of the Court of Appeal (1908) 1 K.B. 13 (noted ante, p. 195). This it may be remembered was the case where the plaintiff was induced by one White to give him a cheque payable to one Kerr for the alleged purchase of shares. Kerr was an existing individual, but the proposed purchase of shares was really a fraudulent representation of White, who forged Kerr's indorsement of the cheque and succeeded in stealing the money. The defendant bank endeavoured to get over the difficulty by setting up that Kerr was in the circumstances a fictitious payee, and the cheque was, therefore, under the Bills of Exchange Act, payable to bearer, but the defence failed below and had no better success in the House of Lords.

**MARINE INSURANCE—CONSTRUCTIVE TOTAL LOSS—POLICY ON SHIP
—VALUE OF WRECK—COST OF REPAIR.**

Macbeth v. Maritime Insurance Co. (1908) A.C. 144 is an important decision on the question what is the proper test for ascertaining whether a loss under a policy of marine insurance is to be deemed a constructive total loss; because the House of Lords (Lord Loreburn, L.C. and Lords Robertson and Collins) have overruled the decision of the Court of Appeal in *Angel v. Merchants' Marine Insurance Co.* (1903) 1 K.B. 811. In this case the policy provided that the insured value £12,000 was to be taken as the repaired value in ascertaining whether the vessel was a constructive total loss. The vessel was driven on to rocks, and notice of abandonment given, and the insured claimed to recover as for a constructive total loss. It was found by Walton, J., who tried the action that the cost of repair would be £11,000 and that the value of the wreck was £3,000. The insured claimed to add the value of the wreck to the estimated cost of repairs for the purpose of ascertaining whether the loss was a constructive total loss and the House of Lords held that he was entitled to do this. Lord Loreburn, however, says the real test is whether a prudent uninsured owner would repair having regard to all the circumstances. We presume the reason why the value of the wreck should be added to the cost of repair, is this, though it is not very clearly stated in the report, viz., that in order to ascertain the cost of the repaired vessel, you must take into account what the value of the vessel is before the repairs are made, and then adding that to the cost of repairs you find that for £14,000, you have obtained a vessel which is only worth £12,000 and therefore from the prudent man's standpoint to repair a vessel in such circumstances would not be expedient or reasonable.

**PRACTICE—SPECIAL LEAVE TO APPEAL TO KING IN COUNCIL—
LEGISLATION REMOVING GROUND OF APPEAL AS TO FUTURE
CASES.**

In *Commissioners of Taxation v. Baxter* (1908) A.C. 214 an application was made for special leave to appeal from a decision of the High Court of Australia on the ground that that court had refused to follow a previous decision of His Majesty in Council to the effect that the Australian States had no power to impose income tax on salaries paid to federal officials. Before the application was heard a statute had been

passed expressly giving such power to the States and the point in controversy could not arise again, and, as the amount in question was trifling, leave was refused.

**TWO CONTEMPORANEOUS WILLS—ELECTION—TESTATOR'S WIDOW
ELECTING TO TAKE AGAINST ONE WILL, CANNOT CLAIM UNDER
THE OTHER.**

Douglas-Menzies v. Umphelby (1908) A.C. 224 was an appeal from the Supreme Court of New South Wales. A summary application was made to that court to determine the rights of parties under two separate wills made by a testator concerning respectively his estates in Scotland and Australia and which wills together formed one scheme for the distribution of his estate. The widow elected to take against the will dealing with the Scotch estates, but claimed the benefit of the provisions made for her benefit by the will dealing with the testator's Australian property. The New South Wales court decided she could do this, but the Judicial Committee of the Privy Council (Lord Macnaghten, Robertson, Atkinson and Collins and Sir A. Wilson) held that the two instruments formed one will, and that the widow having elected to defeat the will in part could claim no interest under the Australian will. Their Lordships also held that the appellant, who was a beneficiary under the Scottish will only, had a good locus standi to maintain the appeal, being interested in protecting the Australian estate in order to compensate those who had been deprived of benefits under the will by the widow's election.

**REGISTRATION OF TITLE—WRONGFUL REGISTRATION—REMAINDER-
MAN—MEASURE OF DAMAGES.**

Spencer v. Registrar of Titles (1908) A.C. 235 was an action to recover compensation against the Assurance Fund under the West Australian Torrens Act for damages sustained by the plaintiff through the wrongful registration of the title to certain land in 1875 at which time the plaintiff was entitled thereto in remainder. The plaintiff's estate fell into possession in 1903 and the question was whether the measure of damages was the value of the land and building as they existed in 1875 or in 1903. The Australian Court held that the measure of damages was the value of the land exclusive of any buildings erected thereon after 1875, but the Judicial Committee (Lords Macnaghten, Robertson, Atkinson and Collins, and Sir A. Wilson)

considered this erroneous, and held that the plaintiff was entitled to the value of the land plus the value of any buildings existing thereon in 1903 when the plaintiff's right of action accrued.

SPECIAL LEAVE TO APPEAL IN CRIMINAL CASE.

In *Tshingumuzi v. Attorney-General of Natal* (1908) A.C. 248 special leave to appeal to His Majesty in Council in a criminal case in which there was a conflict of evidence, and as to the effect of which there was a difference of opinion in the court below, was refused. The Judicial Committee of the Privy Council being of the opinion that there had been no violation of any principle of natural justice, and that no grave or substantial injustice had been done.

TRIAL BY JURY—EVIDENCE FAIRLY SUBMITTED—SETTING ASIDE VERDICT—NEW TRIAL—SPECIAL LEAVE TO CROSS APPEAL NUNC PRO TUNC.

Toronto Railway Co. v. King (1908) A.C. 260 was an appeal from the Ontario Court of Appeal. The action was brought under Lord Campbell's Act for the recovery of damages for the death of a driver of a wagon killed while endeavouring to cross the track of the Toronto Street Railway, by collision with a motor car of the defendants. The evidence was fairly submitted to the jury and a verdict rendered for the plaintiffs for \$3,000 and \$1,500 respectively. The case was carried to the Court of Appeal and all the members of that Court came to the conclusion that the evidence did not warrant a verdict for the plaintiff, two of the learned judges thought the verdict should be set aside and the action dismissed, but the other three held that there should be a new trial. From this order the defendants appealed claiming that the action should have been dismissed. Pending the appeal the respondents obtained leave to a cross appeal nunc pro tunc also from the order and to restore the judgment at the trial. The Judicial Committee of the Privy Council (Lord Loreburn, L.C., and Lords Macnaghten, Atkinson and Collins, and Sir A. Wilson) were of the opinion that there was no conflict in the evidence which had been fairly submitted to the jury, and that the dissent of the judges of the Court of Appeal from the inferences apparently drawn by the jury from the evidence was not a proper ground for setting aside the verdict, the order of the Court of Appeal was therefore rescinded and the judgment at the trial restored.

 REPORTS AND NOTES OF CASES.

Dominion of Canada.

 SUPREME COURT.

Man.]

FRASER v. DOUGLAS.

[June 9.]

Married woman—Separate property—Debts of husband—Execution—Registration under "Real Property Act"—Married Women's Act—Conveyance during coverture.

Where land was transferred, as a gift, to a married woman by her husband, during the time that the "Married Women's Property Act," R.S.M. (1891) c. 95, was in force, the husband being then solvent, and a certificate of title therefor issued in her name under the provisions of the Manitoba "Real Property Act" the beneficial as well as the legal interest in the land vested in her for her separate use, and neither the land nor its proceeds can be taken in execution for the debts of the husband subsequently incurred, notwithstanding the provisions of the second section of the "Married Women's Property Act" respecting property received by a married woman from her husband during coverture.

Appeal dismissed with costs.

T. Mayne Daly, K.C., and *J. Travers Lewis*, K.C., for appellant. *Pitblado*, for respondent.

Man.]

DOMINION BANK v. UNION BANK.

[June 9.]

Banks and banking — Forged cheques — Negligence — Responsibility of drawee—Payment by mistake—Principal and agent —Change of position—Laches.

A cheque for \$6, drawn on the Union Bank was fraudulently altered by changing the date and the name of the payee, and by raising the amount to \$1,000. The drawee refused payment for want of identification of the person presenting it. The defendant bank, without requiring identification, advanced \$25 in

cash to the forger on the cheque, placed the balance to his credit in a deposit account, indorsed it and received the full amount of \$1,000 from the drawee. After receipt of this amount the Dominion Bank paid the further sum of \$800 to the forger out of the amount so placed to his credit. The fraud was discovered a few days later and, on its refusal to refund the money, an action was brought to recover it back from the Dominion Bank as indorser or as having received money paid under mistake of fact.

Held, that the drawee of the cheque, although obliged to know the signature of its customer, was not under a similar obligation as to the writing in the body of the cheque; that, as the receiving bank had dealt with the drawee as a principal and not merely as the agent for the collection of the cheque and had obtained payment thereof as indorser and holder in due course it was liable to the drawee which had, through the negligence of the receiving bank, been deceived in respect to the genuineness of the body of the cheque, and that the drawee was entitled to recover back the money which it had thus paid under mistake of fact notwithstanding that, after such payment, the position of the defendant had been changed by paying over part of the money to the forger.

Judgment appealed from (17 Man. R. 68) affirmed, IDINGTON, J., dissenting.

Appeal dismissed with costs.

Shepley, K.C., and *D. H. Laird*, for appellant. *Ewart*, K.C., for respondent.

Que.] HÉBERT v. LA BANQUE NATIONALE. [June 16.

Bills and notes — Material alteration — Forgery — Partnership mandate — Assent of parties — Liability of indorser — Construction of statute — Bills of Exchange Act.

R. induced H. to become a party to and indorser of a demand note for the purpose of raising funds and agreed to give warehouse receipts as security to the bank on discounting the note. It was arranged that the goods covered by the warehouse receipts were to be held and sold on joint account, each sharing equally in the profits or losses of the transaction. Subsequently, R. altered the note, without the knowledge or consent of H., by adding thereto the words "avec interet a sept par cent. par an," and falsely represented to the bank that H. held the warehouse receipts as collateral security for his indorsement. A couple of months later

H., for the first time, became aware that the goods had never been purchased or placed in warehouse, that no warehouse receipt had been assigned to the bank and did not until some months later know that the alteration had been made in the note. There was some evidence that H. had asked for time to make a settlement of the amount due to the bank upon the note after he had become aware of the fraud and the alteration so made.

Held, by IDINGTON, MACLENNAN and DUFF, JJ., that the instrument was a forgery and could not be ratified by an *ex post facto* assent. *The Merchants Bank v. Lucas*, 18 Can. S.C.R. 704; Cam. Cas. 275, and *Brook v. Hook*, L.R. 6 Ex. 89, followed.

Per IDINGTON, J.:—The circumstances of the case did not shew that there had been any assent to the alteration within the meaning of s. 145 of the "Bills of Exchange Act."

Per MACLENNAN, J.:—The assent required to bring an altered bill within the exception provided by section 145 of the "Bills of Exchange Act," R.S.C. (1905), c. 119, must be given by the party sought to be bound at the time of or before the making of the alteration.

Held, also, the Chief Justice and DAVIES, J., *contra*, that, in the special circumstances of the case, there was no partnership relation between the parties to the note for the purposes of the transaction in question and there could be no implied authorization for the making of the alteration in the note.

Per FITZPATRICK, C.J.:—The transaction in question was a joint venture or particular partnership for the enterprise in contemplation of the parties and, consequently, R. had a mandate to make whatever agreement was necessary with the bank to obtain the funds and to provide for the payment of interest on the advances required to carry out the business.

Appeal allowed with costs.

Bisaillon, K.C., and *A. Geoffrion*, K.C., for appellant. *Laurondeau*, K.C., for respondent.

Ex. C.]

[June 16.

BOW McLACHLAN & Co. v. THE "CAMOSUN."

Admiralty law—Jurisdiction of the Exchequer Court of Canada—Claim under mortgage on ship—Action in rem—Pleading—Abatement of contract price—Defects in construction—Damages.

In an action in rem by the builders of a ship to enforce a mortgage thereon given to them on account of the contract price

for its construction, the owners, for whom the ship was built, may plead as a defence pro tanto that the ship was not constructed according to specifications and claim an abatement of the price, in consequence of such default, and that the loss in value of the ship, at the time of delivery, attributable to such default, should be deducted from the claim under the mortgage.

Appeal dismissed with costs.

R. Cassidy, K.C., for appellants. *Chrysler*, K.C., for respondents.

Ex. C.] *THE KING v. LEFRANCOIS.* [June 16.

Government railway—Operation over other lines—Agreement for running rights—Extensions and branches—"Public work"—Construction of statute—54 & 55 Vict. c. 50, s. 67(D.)—Exchequer Court Act, 50 & 51 Vict. c. 16, s. 16(c); R.S.C. 1906, c. 140, s. 20(c).

The agreement between the Government of Canada and The Grand Trunk Railway Company, made under the provisions of the Dominion statute, 43 Vict. c. 8, giving the Government running rights and power over a portion of the Grand Trunk Railway, from Levis to Chaudière, between two sections of the Intercolonial Railway, constitutes that portion of the Grand Trunk Railway a part of the International Railway, under the provisions of the 67th section of the Act, 54 & 55 Vict. c. 50(D.), and, consequently, a public work within the meaning of the "Exchequer Court Act," 50 & 51 Vict. c. 16, s. 16(c), now R.S.C., 1906, c. 140, s. 20(c).

Appeal dismissed with costs.

Newcombe, K.C., for appellant. *Lane*, K.C., for respondent.

Ont.] *GREER v. FAULKNER.* [June 16.

Damages—Trespass—Cutting timber—Sale to bonâ fide purchaser—Action by owner of land—Amendment.

F. conveyed land to his wife not knowing that timber thereon had been wrongfully cut and sold to G. It was afterwards found that G., who bought it in good faith, had sold the timber to another bonâ fide purchaser and an action was brought by F.'s wife against the latter and G. The purchase money having been paid into court an interpleader issue was granted to decide whether the plaintiff or G. was entitled to it.

Held, affirming the decision of the Court of Appeal (16 Ont. L.R. 123), which reversed the judgment of the Divisional Court (14 Ont. L.R. 360), DUFF, J., expressing no opinion, that the plaintiff was entitled to the whole of the purchase money without deduction for expense of cutting and transportation.

Held, also, IDINGTON, J., hesitante, and DUFF, J., dissenting, that if necessary the writ and interpleader order could be amended by adding F. as a co-plaintiff with his wife.

Appeal dismissed with costs.

W. H. Blake, K.C., and Anglin, K.C., for appellants. Shepley, K.C., and C. A. Moss, for respondents.

Ont.] THOMPSON v. ONTARIO SEWER PIPE CO. [June 16.

Negligence—Proximate cause—Finding of jury—Evidence.

T., an engineer, was scalded by steam escaping when the front of a valve was blown out by pressure. In an action for damages against his employers the jury found that the defendants were negligent in running the engine on an improper bed; that they not furnished proper appliances and kept them in proper condition for the work T. was to do, the engine, bed and room all being in bad condition; and that the valve was not defective.

Held, that in the absence of a finding that the negligence imputed to the defendants was the proximate cause of the injury to T. and of evidence to support such a finding the action must fail.

Appeal dismissed with costs.

Robert McKay, for appellant. Hellmuth, K.C., and Greer, for respondents.

Province of Ontario.

COURT OF APPEAL.

Full Court.]

[June 19.

PETERBOROUGH HYDRAULIC POWER CO. v. MCALLISTER.

Banks and banking—Right of bank to carry on business—Assignment of lease—Obligation to pay rent.

In 1905, the defendants, a firm carrying on a milling busi-

ness, being heavily indebted to a bank, and unable to make payment, a settlement was effected, an agreement being entered into between them and the bank, which was executed by them, and by the local manager of the bank on its behalf, whereby, after reciting the indebtedness, and that the bank held, as part security therefor, a lien, under the Bank Act, on the firm's goods and merchandise; and that it had an assignment of the book debts, as well as of a policy of insurance on the life of one of the partners—the firm paid \$10,000 to the bank, and surrendered to it all its assets, the bank, in consideration thereof, assuming the payment of the firm's liabilities, as set out in a memorandum attached, which, however, did not specifically refer to the lease; and were to forthwith release the firm, as well as the individual partners from all liability. At the same time another agreement was entered into, similarly executed, for, as was stated, the more convenient liquidation of the assets, and disposal of the business as a going concern, whereby M., one of the partners, was to act as manager and continue the business in the firm's name, the bank indemnifying him against all liability therefor. This release agreed on was duly executed by the bank under the corporate seal. Subsequently a power of attorney was executed by the bank, appointing the said local manager its attorney, with the view of carrying out an anticipated sale of the business, but which was not consummated. The mill property was held by the firm under a lease, which contained a covenant against assigning without the lessor's consent. The lessors were apparently unaware of the assignment to the bank, and had never given any consent, but they had, on being applied to by M., signified their willingness to consent to any assignment that might be required.

Held, that the agreement was, under the circumstances, valid and binding on the bank, and the bank became the lawful assignees of the lease, and that the carrying on of the business, in view of the powers conferred by s. 81 and other sections of the Bank Act, R.S.C. 1906, c. 29, was not *ultra vires* under s. 76 (2a) of the said Act; and that the defendants were entitled to claim indemnity from the bank for a claim made by the lessors for rent due under the lease.

Judgment of the Divisional Court reversed, and that of the trial judge affirmed.

Wallace Nesbitt, K.C., for appellants. *James Bicknell*, K.C., for respondents.

HIGH COURT OF JUSTICE.

Riddell, J.]

IN RE AABON ERB (No. 1).

[May 11.

Assignment for benefit of creditors—Collateral securities held by bank—Refusal to value—Appeal to judge in Chambers—Jurisdiction—"Judge of the Court of Appeal"—Transfer of motion under C.R. 784—Costs—63 Vict. c. 17, s. 14(O.).

A., having made an assignment for the benefit of creditors, the M. bank filed a claim for over \$25,000, for which they held as collateral security certain notes made by the B. company to A. and endorsed by him, to an amount over \$17,500. The bank declined to value these securities, in which position they were supported upon an application being made to a county judge. The assignee thereupon served notice of motion before the presiding judge in Chambers, "by way of appeal from the order" of the county judge, and to reverse the same and for an order that the M. bank should value the securities held by them against the B. company, "or for such other order as may be just." The matter having come before Britton, J., he permitted an amendment to be made in the notice of motion, changing it into a notice for special leave to appeal under 53 Vict. c. 17, s. 14(O.).

Held, 1. There was no jurisdiction to entertain the motion, as under the statute the leave is to be granted "by a judge of the Court of Appeal," which means that division of the Supreme Court of Judicature which is called in the Judicature Act, s. 3(2), "the Court of Appeal for Ontario," and in most other parts of the legislation, simply "the Court of Appeal."

2. Under the general prayer "for such other order as may seem just," the application for leave to appeal might, on payment of costs be transferred to a judge of the Court of Appeal under Con. Rule 784, which provides that "where any motion or appeal is set down to be heard before a court which is not the proper court for hearing the motion or appeal, the same may, upon such terms as may seem just, be transferred to, and shall be heard by, the proper court for hearing the same."

3. Under Con. Rule 1130(1), costs may be awarded against the applicant in cases in which the tribunal applied to has no jurisdiction.

Middleton, K.C., for applicant. *J. E. Jones*, for the Merchants Bank of Canada.

Riddell, J.] IN RE AARON ERB (No. 2). [May 12.

*Assignment—Collateral securities—Refusal to value—Order of
County Court judge—Certiorari—Power of court to grant
—Right of appeal—Judicial discretion—Costs.*

After notice of the application referred to in the preceding note was given, the assignee served another notice of motion "for an order in the nature of certiorari" to bring up and review the proceedings before the County Court judge, and for an order directing the valuation of the securities held by the bank, etc.

Held, that in respect of the application for certiorari, the County Court judge, acting as he was, is an inferior court to which such an order might be addressed, and that the fact that there is a right of appeal apparently, given by leave obtained from a judge of the Court of Appeal does not oust the power of this court to grant such an order.

After judgment, however, the order for certiorari is no longer *ex debito justitiæ*, but is a matter of judicial discretion, and in general no order should be made unless and until all other remedies which would afford adequate relief have failed. In the present case, therefore, no order should issue until after an application has been made to a judge of the Court of Appeal for leave to appeal from the order of the county judge, and the application should be dismissed with costs, as the motion should not have been made before applying to the proper forum for leave to appeal.

Middleton, K.C., for applicant. *J. E. Jones*, for Merchants Bank of Canada.

Divisional Court, Q.B.D.] [June 18.

BARRINGTON v. MARTIN.

*Mechanics lien—Description of claimant and of goods supplied
—Date of lien.*

In a claim for a lien against certain land, under R.S.O. 1897, c. 153, the claimant was described merely as "of Toronto," while the claim was stated to be against the estate of M. for "material supplied" before a named date. M. was not the owner of the land, though believed so to be by the claimant,

Held, reversing the order of the Master in Chambers that the claim was sufficient.

R. Mackay, for claimants. *Jennings*, for plaintiff. *Payne*, for defendants.

Province of Nova Scotia.

SUPREME COURT.

Meagher, J., Chambers.]

[July 18.

HALL v. THE QUEEN INSURANCE CO.

Collection Act—Assignment and re-assignment—Effect of—Rights of subsequent assignees.

The plaintiff H. made assignments under the Collection Act to the Canadian Bank of Commerce and other creditors of which notice was given to the defendant company, in the order in which the different assignments were made.

Subsequently the bank re-assigned its claim to the plaintiff subject to an undertaking on the part of plaintiff and his solicitor that the bank's claim amounting to \$792.00 would be paid in the first place out of the moneys to be recovered in the action.

Held, 1. That the assignment to the bank in the first place and the notice to defendant vested in the bank the exclusive right to sue for and recover the loss and that the parties to whom the subsequent assignments were made merely stood in the shoes of the plaintiff and possessed no greater right than he did to compel an accounting by the bank.

2. That the re-assignment to plaintiff by the bank merely vested in him the title and rights that the bank then held. And that the rights acquired by them against the fund in the hands of the bank before the re-assignment could not be affected by any subsequent act or transfer by the plaintiff and could not be extinguished or prejudiced by any subsequent legal proceeding.

3. That the re-assignment by the bank to the insured gave him no power or control over the fund that would enable him to give priority to anyone else over those who obtained assignments

subsequent to the assignment to the bank, but prior to the re-assignment to the insured.

4. That the effect of the re-assignment by the bank was to displace its lien upon the balance of moneys recovered under the judgment and that the other creditors to whom assignments were made subsequent to the assignment to the bank, thereupon became entitled to such balance in order of priority.

Paton, K.C., and Robertson, for claimants.

Graham, E.J., Chambers.]

[July 24.

THE DOMINION COAL CO. v. BURCHELL.

Striking out pleas—Practice as to.

On application to strike out a portion of the defence as false part having already been struck out on another ground, the court will look altogether to the defendant's affidavits answering the plaintiff's to see if he has any defence.

The evidence cannot be weighed.

Covert, for applicant. Ritchie, K.C., contra.

Province of Manitoba.

COURT OF APPEAL.

Perdue, J.A.]

TRADERS BANK v. WRIGHT.

[June 29.

Costs—7 & 8 Edw. VII., c. 12, ss. 1, 2—Injunction—Interlocutory motion or application.

In this action, which was commenced after 7 & 8 Edw. VII., c. 12 came into force, the plaintiffs obtained an interim injunction against the defendants which was afterwards dissolved by the Court of Appeal, ante, p. 468, and the plaintiffs had to pay the costs of the motion and the appeal. Sec. 1 of that Act provides that the amount of costs, exclusive of disbursements, but inclusive of all interlocutory motions and applications and

any appeal or appeals therefrom to the Court of Appeal, which may be taxed and allowed to the successful party in any action or proceeding, as against any other party thereto, up to and inclusive of the trial or final disposition of any such action or proceeding in the Court of King's Bench, shall, subject to the proviso at the end of the section (giving the trial judge a discretion to increase the amount), be limited to the sum of three hundred dollars.

Held, that a motion for an interim injunction is an interlocutory motion or application, and the defendants' costs could not be taxed against the plaintiffs at more than \$300, exclusive of disbursements.

Sec. 2 of the same Act, subject to a proviso giving a discretion to the Court of Appeal to increase the amount, provides that no greater sum than one hundred dollars, exclusive of disbursements, shall be taxed and allowed for costs of appeal from the final disposition of an action or proceeding in the Court of King's Bench, to the successful party in any appeal to the Court of Appeal as against any other party thereto.

Held, that the defendants appeal came within s. 1 and not within s. 2 and they could not be allowed the \$100 provided for by s. 2 in addition to the \$300 limited by s. 1.

Mulock, K.C., for plaintiffs. *Minty*, for defendants.

KING'S BENCH.

Mathers, J.]

[June 29.

RE CROWN MUTUAL HAIL INSURANCE CO.

Company—Costs of procuring Act of incorporation—Liability of company for—Appropriation of payments—Marshalling of assets.

Application by the Attorney-General, at whose instance the company was being wound up pursuant to ss. 42-44 of the Act incorporating the company, 3-4 Edw. VII. c. 69, for a direction to the receivers to disallow, as a claim against the company, a solicitor's bill of costs for fees, charges and disbursements. The bill covered charges for drawing the Act and promoting its passage through the legislature, for procuring the passage

of an amending Act and for services rendered to the company after organization. The solicitors had already been paid \$250 on account, leaving a balance claimed of \$838. There was no provision in the Act for payment by the company of the costs and expenses of obtaining the Act and preparatory thereto.

Held, that, without such a provision in the Act or charter incorporating a company, it is not liable for the expenses of procuring its incorporation unless after incorporation it agrees to pay them. *Hamilton*, 69; *Lindley*, 196, and *Healey*, 557.

The opinion expressed in *Brice on Ultra Vires*, at p. 770, that the solicitors would have an equitable claim against the company on the ground that it had taken the benefit of the solicitor's services, is expressly dissented from in *In re English and Colonial Produce Company, Ltd.* (1906), 2 Ch. 435.

Held, however, that, as the company might have paid the solicitor's pre-incorporation costs, *Gore-Brown on Companies*, 119, they should now be permitted to appropriate the \$250 already paid to such costs as was done in that case.

The company was a mutual hail insurance company and the Act permitted the directors to make assessments annually to cover only losses by hail during the crop season, and the expenses for the year, so that no assessment could be made to pay any part of the solicitor's bill. There was, however, a reserve fund accumulated under the Act which might "be applied by the directors to pay off such liabilities of the company as may not be provided for out of the ordinary receipts for the same or any succeeding year."

Held, that those creditors for the payment of whose claims an assessment could be made should be compelled, in the first place, to have recourse to that method of payment, so as to leave the reserve fund available as far as possible to pay the solicitor's bill. The assessment already made to stand and the proceeds to be applied first in payment of the claims against the company other than the costs in question; any remaining debts, including the amount found due on taxation to the solicitors for services subsequent to the incorporation, to rank pro rata on the reserve fund, after payment of the receiver's costs.

Patterson, D.A.G., for Attorney-General. *Mulock*, K.C., for receiver. *Minty*, for solicitors.

Mathers, J.] BENT v. ARROWHEAD LUMBER CO. [June 29.

Principal and agent—Commission on sale of land.

The defendant's president made an agreement with the plaintiff that, if he would procure a prospective purchaser for the timber limits owned by the defendants in British Columbia, the company would offer the property at \$550,000, and, in the event of a sale, would pay the plaintiff a commission of \$50,000, but any abatement of the named price down to \$500,000 was to come out of the plaintiff. The defendant's president had authority to make that bargain with the plaintiff.

The plaintiff found a purchaser to whom the property was subsequently sold without the plaintiff's knowledge or concurrence at the net price of \$500,000, and this sale was the result of the introduction of the property by the plaintiff to the purchaser. The trial judge also found that the defendant's president knew, when negotiating with the purchaser, that he was the plaintiff's purchaser.

Held, that the plaintiff was entitled to be remunerated for his services quantum meruit. *Lacotors v. Clough*, ante p. 503; *Pardee v. Ferguson*, 5 O.W.R. 698, 6 O.W.R. 810, and *Bridgman v. Hepburn*, 8.W.L.R. 28, distinguished.

Verdict for plaintiff for \$25,000 and costs.

Galt, for plaintiff. *Wilson and Robson*, for defendants.

Mathers, J.] FREDKIN v. GLINES. [June 29.

Growing wild hay, whether goods or lands—When purchaser is to cut and remove it—Sale of Goods Act.

The defendants sold to the plaintiff the wild hay growing on certain lands to be cut and removed by the plaintiff. He paid the price and proceeded to cut and remove the hay when he was stopped by a person rightfully entitled to it. The defendants then admitted they had made a mistake as to their right to sell the hay and offered to return the money to the plaintiff. He refused it and sued for damages for breach of an implied warranty of title. At the trial the defendants contended that the thing sold was an interest in land as to which there could be no implied warranty of title.

Held, that, under paragraph (h) of s. 2 of R.S.M. 1902, c. 152, the hay was "goods," as it was a "thing attached to or forming part of the land which was agreed to be secured . . . under the contract of sale," and that the defendants were liable in damages as claimed. The statute has extended the common law: *Benjamin on Sales*, p. 190.

Hudson and Laurence, for plaintiff. *Wilson and Jameson*, for defendants.

Cameron, J.] *ALLOWAY v. MUNICIPALITY OF MORRIS*. [July 4.

Sale of land—Warranty of title—Representation that land patented—Recovery of money paid under mistake of fact—Assessment Act—Caveat emptor—Limitation of actions.

The defendant municipality on 12th April, 1902, offered to sell by public auction the lands in question, for arrears of taxes, and the plaintiff offered \$166.16 for them. This being the highest bid, the defendants sold and conveyed the lands to the plaintiff for that sum which he paid. The lands had been previously advertised for sale in the *Manitoba Gazette*. That advertisement, signed "H. R. Whitworth, Secretary-Treasurer, Rural Municipality of Morris," under the heading "patented or unpatented," had the lands listed as "pat'd." The plaintiff paid the defendants subsequent taxes for 1902 and 1903, amounting to \$248.23. It was admitted that, at the time of the sale, the lands were unpatented, also that the defendants had, under s. 159 of the Assessment Act, R.S.M. 1902, c. 117, authorised the treasurer to sell the lands.

Held, that the defendants had expressly warranted that the lands were patented and were liable to the plaintiff for the damages suffered by him in consequence of having paid his money on the strength of that warranty and that such damages should be fixed at an amount equal to the sum of all the moneys he had paid them together with simple interest at five per cent. per annum. *Blackwell*, on Tax Titles, s. 1007; *Chapman v. Brooklyn*, 40 N.Y. 379; *Pearson v. Dublin* (1907) A.C. 351 followed; *Austin v. Simcoe*, 28 U.C.R. 73, distinguished.

It was argued at the trial that the treasurer was a statutory officer, independent of the municipality, and performing duties imposed on him by statute and that, therefore, the municipality was relieved from any liability for his actions, and *Seymour v. Maidstone*, 24 O.R. 370; *Forsyth v. Toronto*, 20 O.R. 478, and *McLellan v. Assiniboia*, 5 M.R. 265, were relied on.

Held, distinguishing those cases, and following *Hesketh v. Toronto*, 25 A.R. 449, and *McSorley v. St. John*, 6 S.C.R. 531, that the municipality, having appointed the treasurer and having control over him in the discharge of his duties, with power to retain or dismiss him, was responsible for his acts in discharging such duties in matters that were of benefit to it.

Held, also, that the doctrine caveat emptor, does not apply when the vendor takes upon himself to inform the purchaser and the purchaser agrees to trust to him with regard to particulars which he could ascertain himself by inspection. *Kerr*, on *Frauds*, p. 69; *Barr v. Doan*, 45 U.C.R. 491.

Held, also, that the plaintiff had a right to recover the amounts subsequently paid by him for taxes as damages resulting from the breach of warranty established, notwithstanding the six months limited by s. 229 of the Assessment Act, for the commencement of any action against a municipality "for the return of any moneys paid to it on account of a claim, whether valid or invalid, made by the municipality for taxes, whether under protest or otherwise," had elapsed.

Ferguson, for plaintiff. *Hudson* and *McLaws*, for defendants.

United States Decisions.

FIDELITY BOND.—The failure of the obligee in a fidelity bond to communicate to the sureties, at the time of its execution, the fact that the principal was indebted to the obligee for money embezzled, is held, in *Hebert v. Lee* (Tenn.) 12 L.R.A. (N.S.) 247, to relieve the sureties from liability on the bond, although they made no inquiry upon that subject, and no communication took place between obligee and sureties about the bond, the execution of which was secured by the principal, and the bond purported to cover past, as well as future, obligations.

ULTRA VIRES.—After an elaborate and theoretical discussion of the doctrine of ultra vires, it is held, in *Bell v. Kirkland*, 102 Minn. 213, 113 N.W. 271, 13 L.R.A. (N.S.) 793, that a contractor's bondsmen will not be permitted to set up the fact that the contract between the municipality and the contractor was irregular, as a defense to an action brought upon the bond by materialmen for material furnished to the contractor.

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THE RIGHT OF DISALLOWANCE.

That judge must have been speaking in terms of bitter irony who, in giving his decision in a recent case, used these words: "The Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine. If it be that the plaintiffs acquired any rights, which I am far from finding, the Legislature had the power to take them away. The prohibition 'Thou shalt not steal' has no legal force upon the sovereign body, and there would be no necessity for compensation to be given."

In using this language Mr. Justice Riddell knew, what every student of history knows, and what every Christian believes, that disobedience of the moral law, as declared in the ten commandments, will bring its own punishment, alike upon the government which wilfully sets it aside, and upon the country which submits to be so governed. And this law is as applicable, both in its operation and in its results, to men as well as to governments and peoples. Nor is it a doctrine only for women and priests which men of affairs, in busy times like these, can venture to disregard. It has the sanction of religion, it has been accepted by the wisest, as well as the best, of human kind, but besides all this it has been attested by the experience of all ages. Countries brought to desolation, communities ruined, families reduced to poverty, and men and women driven to despair, shew what follows upon neglect of it.

On the other hand, Great Britain mainly owes her supremacy among the nations to the fact that, in general, her Parliament, speaking for the nation at large, and possessing all the power described in the judgment referred to, has never exercised it in the cause of injustice—that her statesmen, her merchants, her representatives in all parts of the world, both by sea and land,

have acted in the belief that duty and honour, as well as interest, required them to act in accordance with the precept that it is righteousness, not expediency, truth and not falsehood, honesty and not dishonesty, that exalt a nation, and bring prosperity and happiness to its people.

We will not insult the members of the Provincial Government by assuming them to be ignorant of, or careless in applying, the great principle upon which alone good government can be carried on, and therefore will assume that, in the action to which the learned judge referred in such significant terms, they had, or thought they had, good grounds for their procedure. We propose to enquire whether the position taken by Mr. Justice Riddell is constitutionally correct and if so how must that position be regarded?

In making this enquiry it is not necessary to enter into all the nice questions which arise from a careful consideration of the several jurisdictions of the Dominion and Provincial Legislatures. It may be broadly stated that, as regards the subjects over which the ninety-second section of the B.N.A. Act gives to the provinces exclusive jurisdiction, their authority cannot be questioned, but, it may be asked, while this is true, is there not, or ought not there to be, some means by which abuse of this authority may be prevented, and no ground given for the inferences plainly to be drawn from the judgment in the case referred to?

The omnipotence of the Imperial Parliament over the affairs of the United Kingdom, and those of its dependencies to which constitutional government has not been granted, may well be expressed in the terms used by the learned judge in describing the powers of the Provincial Legislature within its sphere of action—"it can do everything not naturally impossible." We will not apply the rest of the description for reasons to be shewn hereafter. The Imperial Parliament is bound by rules both human and divine, but they are rules of its own making, or arising naturally from its constitution and environments. In the first place it is a complex machine composed of forces acting

like the pendulum of a clock, of which the parts are so balanced that the expansion of the one keeps in check the contraction of the other. Thus hasty and ill-considered legislation is avoided, mistakes corrected, and careful revision provided for. Above all there is a body of public opinion to be reckoned with—a body of public opinion which is above passion, prejudice, or partisanship—which will tolerate no injustice or wrong-doing, and will punish any perpetration of either. Mistakes in public policy may be committed, but an act of aggression on private rights, or private property, never.

Contrast a body like this with the legislature of a province composed of a single chamber whose members, however naturally intelligent, are ill qualified by education or training to deal with complex questions of civil rights—who are strongly partisan, and who are liable to corrupt influences arising from the material development of the country. In the affairs dealt with by the Provincial legislature the public at large take little interest, and there is, therefore, no check from this source, such as prevails with regard to larger bodies which have more important questions to consider.

The only check upon the proceedings of the Provincial Legislatures is to be found in the power of disallowance of their Acts which the B.N.A. Act gives to the Governor-General in Council, and there is no doubt that this check was intended to be exercised for the prevention of injustice, and the protection of private rights, and stability of contracts, which might be affected by hasty and ill-considered legislation by the provincial assemblies. Such was the view of the Imperial authorities when the Act of Confederation was passed, and such was the view of leading men on both sides of politics when the terms of Confederation were being discussed.

This was the position taken by Sir John Macdonald with regard to the well-known case of the Rivers and Streams bill, which was twice passed by the Ontario Legislature, and twice disallowed by the Dominion Government. Speaking of the power of the Provincial Legislature Sir John said: "I think it

devolves upon this government to see that such power is not exercised in flagrant violation of private rights, and natural justice . . . especially when, as in this case, the Act overrides a decision of a court of competent jurisdiction."

In 1893 an Act was passed by the Nova Scotia Legislature which, in the opinion of Sir John Thompson, might have had the effect of prejudicing certain vested rights, and on this being pointed out to the Attorney-General of Nova Scotia the Act was amended accordingly. But whatever the intention of the framers of the Act of Confederation may have been, the long political rivalry between the Conservatives at Ottawa under Sir John Macdonald, and the Liberals at Toronto under Sir Oliver Mowat, would have prevented, and did prevent, any fair consideration of the question.

In the same year that the case in Nova Scotia above referred to arose, a railway company in Ontario complained that the operation of a certain Act of the Provincial Legislature would interfere with vested rights, without compensation, and the Minister of Justice held that if this contention were correct there would be sufficient reason for the exercise of the power of disallowance. The view taken by the Attorney-General of Ontario was expressed as follows: "I repudiate the notion of the petitioners that it is the office of the Dominion Government to sit in judgment on the right and justice of an Act of the Ontario Legislature relating to property and civil rights. That is a question for the exclusive judgment of the Provincial Legislature." As the Minister of Justice finally came to the conclusion that the Act would not have the effect complained of it was not disallowed.

The question of provincial rights thus became a purely party one, and unfortunately was so dealt with in the many matters of controversy which arose between the Dominion and Provincial Governments. The position of parties, so far as Ontario is concerned, has been reversed, and in the case now under consideration a Liberal Minister of Justice is called upon to review the action of a Conservative Provincial Legislature. Mr. Ayles-

worth, in his report on an application for disallowance of an Act which affected the parties in a controversy known as the Cobalt case, takes precisely the view for which we have been contending. He says: "There seems much ground for the belief that the famous B.N.A. Act contemplated, and probably intended, that the power of disallowance should afford to vested interests and the rights of property a safeguard and protection against destructive legislation," and then he goes on to say that the authorities cited on behalf of the petitioner would, if followed, require the disallowance of the Act, but that of later years different views have prevailed. Finally the Minister of Justice declares his opinion that "it is not intended by the B.N.A. Act that the power of disallowance shall be exercised for the purpose of annulling provincial legislation, even though Your Excellency's ministers consider the legislation unjust or oppressive, or in conflict with recognized legal principles, so long as such legislation is within the power of the Provincial Legislature to enact," and he concludes as follows: "The legislation in question, even though confiscation of property without compensation, and so an abuse of legislative power, does not fall within the limits of those cases in which the power of disallowance may be exercised." For these reasons, "though compelled to report strong disapproval of the policy of the statute," the Minister of Justice recommends that it be not disallowed.

It is not easy to follow the reasoning of Mr. Aylesworth. He admits at the outset a belief that the B.N.A. Act intended that the power of disallowance should be used for the protection of vested interests, and private rights, and later he comes to the conclusion that it was not so intended, and that, therefore, the Act should not be disallowed, even though his opinion clearly is that justice requires that it should be so dealt with.

It may be that it is better for the successful working of our federal constitution that the power of the Provincial Legislatures within their own sphere of action should be supreme and unquestioned, and it may be that such a conclusion has become a political necessity. If so we must abandon the hope of finding

in the power of disallowance that protection which the makers of our constitution thought they had provided, and accept the ruling of the Minister of Justice, and the dictum of Mr. Justice Riddell.

It does not follow, however, that we must remain content with the knowledge that the rights of property may be set aside, the stability of contracts interfered with, and the security of commercial enterprises attacked, without compensation being awarded, by a body which it is alleged has shewn so little regard for such obligations, and is so ill-qualified to deal with them as our Provincial assembly. If the power of disallowance is in such cases no longer to be exercised, why should not the party whose rights are in any way interfered with have an appeal to, say, the Supreme Court? Why should not questions of civil rights, where private interests are concerned, be dealt with precisely in the same way that constitutional questions are dealt with—and as they are dealt with in the United States?

There are undoubtedly many cases when it becomes necessary, in the public interest, that private rights should, for the specific object in view, be set aside, but in all such cases that object should be clearly stated, and such compensation as equity requires should be awarded. In the public interest it may be necessary that a railway should pass through my property, and to that public interest my right of private property must yield, but the necessity for doing so must be apparent, and the compensation given must be adequate to the injury suffered. The same rule should apply to all cases in which private rights are affected, and if it is not observed there should be some means of compelling its observance.

The procedure would be very simple. The party aggrieved could lay his complaint before the Minister of Justice, and if the minister felt, as Mr. Aylesworth felt in the Cobalt case, that injustice was being done, instead of recommending that the Act be disallowed he would advise the Governor in Council that the question at issue should be referred to the Supreme Court for consideration and adjustment, the operation of the Act being,

in the meantime, suspended. The question for the Supreme Court would be two-fold—first, did any public interest justify interference with a private right? and, secondly, whether such an interference was injurious and should be prevented, or whether it should be allowed with compensation. If the Supreme Court can be trusted to decide questions affecting the constitution, it is surely equally competent to decide questions affecting civil rights, such as are ordinarily dealt with by the courts, but which a body such as the Provincial Assembly is not competent to deal with, and which very often it has no sufficient opportunity of thoroughly considering.

A procedure such as is here suggested would have this advantage over disallowance, that by it an objectionable clause of a bill, otherwise unobjectionable, might be amended, as was done in the case of the Nova Scotia Act above referred to, the measure otherwise remaining unimpaired.

The numerous judgments recently given which uphold the doctrine that there is no appeal from the action of a Provincial Legislature, so long as it confines itself to subjects committed to it by the B.N.A. Act, has created a wide-spread feeling of alarm among men concerned with financial affairs. The well-grounded idea that the rights of property are less secure in Canada than in the United States and in Great Britain, or, as one eminent financier puts it, than even in Mexico, is not calculated to encourage the flow of capital to this country. On the contrary it puts us at a decided disadvantage as regards every kind of investment and industrial enterprise. The capitalist looking for investments sees that in the United States State Legislatures are not allowed to "make or enforce any law which shall prejudice the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the protection of the laws." Coming to this country he finds that the courts have concluded, contrary to the plain intention of the framers of our constitution, that in dealing with the rights of property, concerning which they

have exclusive jurisdiction, our Provincial legislators are not bound to regard either the provisions of Magna Charta or that still earlier code—the Ten Commandments.

It may be said that the Supreme Court has not that weight and influence which would justify the granting to it such power as is here proposed. If there is any ground for such an objection the remedy is easy. Make the position of the judges of that court as regards dignity and emolument such as to attract the best men of the profession.

Let it be felt that there can be no higher object of ambition than a seat upon the bench of a court possessed of such power and such influence for good, demanding not only the greatest professional attainments, but also the noblest sense of personal independence, and a readiness to accept responsibilities, and discharge duties second to none in the administration of justice, and the government of the State.

With a court so constituted, and possessed of such power, no doubt would be felt as to the security of private rights, the stability of contracts, or the safety of commercial enterprises.

LAW REFORM IN ONTARIO.

It will be remembered that the Attorney-General brought in, and there were passed, at the last session of the Ontario Legislature, a number of resolutions on the subject of law reform. It was thought desirable that these should stand over until next session so that the profession might have an opportunity of considering them, and, if they thought proper, of expressing their views on the various matters referred to therein.

Now that vacation is over and lawyers are settling down to business it will be convenient to have these resolutions accessible for reference and consideration. They are as follows:—

“That in the opinion of this House, with a view to the more prompt and satisfactory administration of justice in civil matters and the assessing of the cost thereof, it is expedient: 1. That

there should be but one Appellate Court for the province. 2. That all the judges of the Supreme Court of Judicature for Ontario should constitute the Appellate Court. 3. That the Appellate Court should sit in divisions, the members of which should be permanently assigned to them, or chosen from time to time by the judges from among themselves. 4. That the divisions should consist of five members, four of whom should be a quorum, except in election cases, and cases in which constitutional questions arise, for which five members should sit, and except in appeals from inferior courts, for the hearing of which three judges should form a quorum. 5. That the decision of the Court of Appeal should be final in all cases except where (a) constitutional questions arise, or (b) questions in which the construction or application of a statute of Canada are involved, or (c) the action is between a resident of Ontario and a person residing out of the province. 6. That the appeal of right to the Judicial Committee of the Imperial Privy Council should be abolished, and the prerogative right of granting leave to appeal to that tribunal, if retained, should be limited to cases in which large amounts are involved, or important questions of general interest arise. 7. That in matters of mere practice the decision of a judge of the Supreme Court, whether on appeal or a judge of first instance, should be final. 8. That provision be made to regulate examinations for discovery to prevent the excessive costs that are often incident to such examinations, and the undue prolongation of such examinations. 9. That the county and district courts shall have jurisdiction in all actions, whatever may be their nature or the amount involved, if both parties consent. 10. That the ordinary jurisdiction of the county and district courts should be increased. 11. That communications should be had with the Imperial and Dominion Governments with the view to legislation by the Imperial and Canadian Parliaments as to such of the foregoing matters as are not within the legislative authority of the province."

Some other matters are referred to in a circular issued by the Ontario Bar Association as desirable subjects for consideration. These have been stated shortly as follows:—

. "1. Unlicensed conveyancing. 2. Weekly reports and practice works to be published by the Law Society. 3. Freedom of contract between solicitor and client. 4. A block system of charges in litigation. 5. Simplification in the mode of commencing and prosecuting legal proceedings. 6. A practice judge. 7. A better Surrogate tariff and procedure. 8. A better division of work among the various legal officers. 9. Judges and officers to receive only their salaries. 10. The profession to be relieved from collecting revenue for the Government through stamps and fees paid to officers. 11. Positions requiring legal knowledge and training to be filled by lawyers only. 12. One opinion only from appellate courts. 13. Execution process to be made more effective. 14. Prompt delivery of judgments by all the judges. 15. Communication between the profession and the statute revisers."

As will be seen, some of the Government resolutions are of a far-reaching character, and, as regards appeals, especially appeals to the Judicial Committee of the Privy Council, are, we venture to think, rather an echo of the popular sentiment so much in evidence before the last Provincial elections, than as representing the sober thought of those most capable of forming an intelligent opinion on the subject.

Most of the matters referred to by the Ontario Bar Association as worthy of consideration have been repeatedly brought to the attention of the profession in these columns as requiring amendment on the part of the provincial legislature. The pronouncement of the Benchers of the Law Society of Upper Canada on the Government resolutions will be found in the proceedings of the society in 16 O.L.R. part 4.

The important matter of law reform will, we trust, be approached by members of the legislature without any reference to party politics and unbiassed by the crude thought of some newspaper men who too often write to please what they think to be the passing fancy of ignorant people, and in that way seek to increase their circulation, regardless of the importance of the issues involved or what may really be for the best interests of the community as a whole.

THE ADVANTAGES OF IGNORANCE.

There are occasional advantages in ignorance, and then, the denser the ignorance the better. This reflection comes to us on reading some remarks in reference to lawyers' fees by a learned divine who is reported to have said in a public address: "A man has no right to go into a profession for fees, for money. I am simply astounded at the lawyers' fees I read about. The fees of lawyers are, many of them, most unaccountable to me." A bull in a china shop would not have half so much fun if he were troubled with any qualms of conscience. Ignorance, therefore, for him, is bliss, as it is also for the preacher who thus airs his ignorance and cheerfully makes uncharitable remarks about other people. The principle of supply and demand is also a thing unknown to him. For our part we confess our ignorance as to the amount of this minister's salary, but we can only say that if it is small it is because he is not worth more, whilst if it is large it is so to the extent that he tickles the ears of his congregation. Brains and experience should demand their fair value; but lawyers as a rule are, in proportion to the accompanying conditions, paid less for their services than any other class in the community. Those of them who make most make less, for example, than a successful bank manager, though probably their advice frequently saves these managers from bringing disaster to their banks. "*Ne sutor ultra crepidem*" might be pondered to advantage by the minister in question, who is also reported to have said, "I would that I had but half the chance some lawyers have of doing good." It might perhaps occur to him, in some moment of introspection, to think that his best way of doing good would be to listen to what the Iron Duke said when he advised an equally erratic presbyter to attend to his marching orders, which he said, were to preach the gospel and not to prate about things of which he was profoundly ignorant. It might also have occurred to him that he, presumably, entered the ministry (and is well paid) for the very purpose of "doing good," so that he ought to have even more than "half the chance" lawyers have in that regard. But as to this we assert without fear of con-

tradition that the latter give proportionately more in charity and do more for nothing than any other body of men, ministers included.

LAW CLERK OF THE HOUSE OF COMMONS.

The position of Law Clerk of the House of Commons, vacant by the death of Mr. F. A. McCord, has been filled by the appointment of the Assistant Law Clerk, Mr. A. H. O'Brien. The new Law Clerk is a B.A. of Toronto University and an M.A. of the University of Trinity College. He was called to the Bar in 1890, and practised in Toronto until 1896, when he was appointed Assistant Law Clerk at Ottawa. Mr. O'Brien was, for many years, one of the editors of this journal, and is the author of several well-known legal works, among them being "O'Brien's Conveyancer," which is now the recognized work on conveyancing precedents for the English-speaking provinces of Canada.

The Law Clerk of the House of Commons being Parliamentary counsel to the Government as well as solicitor to the House, the position is one of importance. In making the above appointment the Government is entitled to the credit of having carried out the very proper rule—although not always followed—of promoting an official who has shewn himself competent.

BILLS AND NOTES—HOLDER IN DUE COURSE.

A fine point on the subject of negotiable instruments has recently arisen both in England and the United States. It is discussed by our contemporary, *Case and Comment*, as follows:

A recent Iowa case, and two recent English decisions, have reached different results on a question of no small importance under the uniform negotiable instruments law. The decision of the Iowa court in *Vander Ploeg v. Van Zuur*, (Iowa) 13 L.R.A. (N.S.) 490, 112 N.W. 807, holds that an innocent payee who takes a promissory note in which a blank has been wrongfully

filled by an agent of the maker cannot be protected, under the uniform negotiable instruments law, as a "holder in due course," to whom the instrument is negotiated after completion,—at least if the payee takes the note for a past indebtedness. The provision just quoted is a modification of the preceding provisions, which gives to the person in possession *primâ facie* authority to fill up blanks, declaring, however, that, in order "that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given, and within a reasonable time." It seems clear, therefore, that the terms of this statute give to a payee no protection as against the wrongful act of the maker's agent in filling up blanks, unless he is within the terms of the exception as a holder in due course, to whom the instrument is negotiated after completion. This the Iowa court holds he is not, and such conclusion is in accordance with the general understanding of the meaning of the language. Men do not ordinarily speak of the delivery of a note to a payee as a negotiation of it, and the accompanying words which describe the transaction as a negotiation of the instrument after completion, to a holder in due course, seem to accentuate the distinction between an original party to the instrument and one to whom it is subsequently transferred. This Iowa decision is supported by the English case of *Herdman v. Wheeler*, [1902] 1 K.B. 361, which is to the same effect, under the English negotiable instruments law, the material provisions of which are practically identical with those of the uniform negotiable instruments law now adopted in many states of the Union. But a later English decision of the Court of Appeal, in *Lloyd's Bank v. Cooke*, [1907] 1 K.B. 794, distinguishes and well-nigh supersedes the *Herdman Case*, by holding that, while the negotiable instruments law may not give the payee in such a case any protection against the wrongful act of the maker's agent in filling the blank, he may still invoke the common-law doctrine of estoppel. This doctrine was not discussed in the Iowa case, or in the *Herdman Case*, in each of which it seems to

have been assumed that the rights of the parties must be determined exclusively by the negotiable instruments law. Those decisions probably settle the construction of the statutory provisions; but they leave open the question of the effect of the statute to destroy the right which payees had previously enjoyed to invoke the doctrine of estoppel. The authorities are practically unanimous in favour of the right of the payee in such a case, unless it is taken away by statute.

A material change in the law, seriously increasing the risks of payees, would result, if it should be established that, under the negotiable instruments law, the doctrine of estoppel can no longer be invoked against a maker whose agent has wrongfully exercised his authority to fill blanks. In that case the payee of a negotiable instrument is allowed less protection than the payee or obligee of a non-negotiable instrument. That a misuse of authority to fill blanks, even in the case of a deed, is subject to the doctrine of estoppel, is illustrated in the case of *McCleery v. Wakefield*, 76 Iowa 529, 2 L.R.A. 529, 41 N.W. 210. The improbability that the legislature would intend this result is to be considered in construing the law. The statute expressly provides that "in any case not provided for in this Act the rules of the law merchant shall govern." This recognizes the Act as a codification of the laws on that subject, superseding the law merchant so far as they conflict. The doctrine of estoppel, as applied to non-negotiable instruments and contracts generally, is obviously unaffected by the statute. It may be argued, therefore, that the provisions in the negotiable instruments law with respect to filling blanks were intended to define the extent and limits of that right in case of negotiable paper only, and particularly with respect to the effect of the negotiable character of the instrument as distinguished from other contracts; and that there was no intention to give the payee of a negotiable instrument less protection against the wrongful acts of the maker's agent than would be given him if the instrument had no element of negotiability in it. As between the maker and the payee of an instrument, it may be urged that its negotiable form is of no importance, and that their rights depend upon common-law rules

governing contracts, and not upon the law merchant. If so, those rules would not be impliedly superseded by the statute. In expressly saving the rules of the law merchant in cases not provided for in the Act, the American statute does not, like the English Act, mention common-law rules; but this seems immaterial for the reason that neither statute was intended to codify rules of the common law beyond the scope of the law merchant. In the *Lloyd's Bank Case* the English court expressly declared that the negotiability of the document constituted no reason why the doctrine of estoppel should not apply, but rather the contrary, as that fact more clearly indicated an intention that the agent should use the instrument as a means of raising money. It seems highly improbable that the intent of the statute was to create this unfavourable discrimination against the payee of a negotiable instrument when compared with the obligee of a non-negotiable contract. In the light of the latest English case applying the doctrine of estoppel, which was not considered in the Iowa case, it may be proper to conclude that this phase of the subject still presents an open question for the courts of this country.

THE DAMNATION OF THE MODERN BAR.

The lawyer has been abused time out of mind, but somehow or another he has never seemed to mind it much. Every now and then he may say something concerning the attacks upon him, but not in anger, or by way of apology or defence. He treats his critics with about the same degree of good-humoured tolerance that a St. Bernard shews to a barking toy spaniel. If the spaniel chooses to bark, why, it's all right, because it doesn't hurt the big dog and may amuse the little one. Besides, it may afford the St. Bernard some pleasing reflections on the difference between big dogs and little ones.

Since, then, lawyers have been so generally and so long abused, why have they not resented it? There are several reasons. As has been suggested, the lawyer's indifference to abuse is partly due to a feeling of superiority to the abuse, if

not to the abusers. He knows full well that he has been and is intrusted with the making, with the construction, and with the enforcement of the laws. He realizes that inasmuch as he has been in a hopeless minority he would not have been invested with such full powers but for good reasons—reasons which have prevailed in spite of the expressed distrust of him. To paraphrase Bancroft's words, he knows that "in the exploration of the region of liberty not a cape has been turned or a river entered, but a lawyer has led the way."

It may be that the lawyer feels a sense of sureness of himself that is not felt by the generality of men. According to Plutarch, one of the two sentences inscribed upon the Delphic oracle was "Know thyself." The lawyer knows himself. Knowing himself, he knows other men. Bearing in mind David's lament for his hasty remark that "all men are liars," he makes due allowance for the intemperate or foolish remarks of an angry or a misguided man. He knows that the one will repent his utterances, and that the other is incapable of appreciating their folly.

Another reason for the lawyer's indifference to lay criticism is that he feels that if he has earned the approbation of his brethren, he has acted well his part. There is nothing he prizes more than the esteem of his fellow lawyers, and nothing he dreads more than their contempt. He knows that if he plays the game and plays it fairly, he will win generous applause, and that if he does not he will earn and receive professional ostracism. He feels that the good opinion of his brothers more than compensates for outside flings, and that without that good opinion nothing else is worth while.

Perhaps another reason for the lawyer's tolerant attitude is that he makes due allowance for the character or motives of those who censure him.

The most vociferous critic of the lawyer is the man who is, for cause, fearful of receiving justice. As compared to any other critic, his voice is as the bray of an ass to the chirp of a cricket. It is easy to dispose of this enterprising gentleman's

cry of "Stop thief!" A mere suggestion of his motive is sufficient. As Trumbull hath it:

"No man e'er felt the halter draw,
With good opinion of the law."

Or as Seymour D. Thompson said in one of his bar association addresses: "Lawyers have always been an inconvenience to despots. The tyrant is always stubbing his toe against the lawyer. Napoleon, the son of a lawyer, hated lawyers." Another despot's attitude towards lawyers is well illustrated by an anecdote concerning him which has been handed down. When Peter the Great, on his visit to Westminster Hall, was told, in answer to a question, that the people in wigs and black gowns were lawyers, he exclaimed: "Lawyers! I have but two in my dominions, and I believe that I shall hang one of them the moment I get home." The other one must have been Peter's "personal counsel"—to borrow a phrase the New York papers delight in using.

The incorrigible jester, with his merry quibs and gibes about the lawyer, comes on next to do his little turn. The lawyer simply can't find it in his heart to be harsh toward this sad wag. He regards him with good nature, and even with sympathy. He has heard the creaking of the machinery and has seen what a serious thing it is to be a funny man. Besides, he rather likes to study the species.

Well, well, says the lawyer when he hears his story, let the little man have his joke, if it pleases him. It doesn't do any harm, it doesn't do any harm. Besides, it's been some time since I heard that joke, and it doesn't do to go back on old friends. Perhaps the best evidence of the lawyer's sureness of his position is, not that he ignores criticism, but that he laughs at the jokes made at his expense.

While the lawyer is tolerant of all kinds of criticism, there is one kind that puzzles him on account of its want of logic, and that is the criticism of the so-called "corporation lawyers." He can understand an attack based on the charge that lawyers are dishonest, but he cannot understand an attack based on the charge that corporation lawyers are corporation lawyers. The

head and front of the corporation lawyer's offending seems to be that he makes money, wears a coat of good cloth, and rides instead of walks. It seems to be considered to be in some mysterious way unprofessional for a lawyer to serve artificial rather than natural persons and to reckon his income in thousands instead of in dollars. It is, of course, true that there are some disreputable corporation lawyers. But it is also true that the corporation lawyer, equally with all other lawyers, is amenable to the punishment meted out by the Bar to members who fail to live up to its best traditions, and that he is equally desirous of earning the esteem of his brother lawyers, and equally afraid of incurring their contempt.

Well, no matter what the other fellow may say while things are running smoothly, the moment he gets in a tight place or the moment he is confronted with a troublesome problem, or the moment he feels the need of some one to trust, he hies him straightway to the lawyer.

"For it's Tommy this, an' Tommy that, an' 'Chuck him out, the brute!' But it's 'Saviour of 'is country,' when the guns begin to shoot."

—*Law Notes.*

A point of interest in reference to criminal jurisdiction was referred to in a note of a case *Rex v. Warden of Dorchester Penitentiary*, ante, p. 358, which note, however, did not quite accurately bring out the point decided. The judgment of Mr. Justice White, who spoke for the court, decides that a police magistrate acting under s. 777 of the revised Criminal Code (formerly s. 788) has the same territorial jurisdiction as the General Sessions in Ontario; and consequently a police magistrate of the City of Halifax has power to hear and decide for an indictable offence of burglary committed in that part of the Province of Nova Scotia. The judgment in the above case was decided on the ground that as s. 777 confers the same jurisdiction on police magistrates as that possessed by the General Sessions of the Peace in Ontario, which court by s. 577 (formerly s. 640) has jurisdiction over the entire province, then such magistrates have a like discretion.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

WILL—CONSTRUCTION—GIFT OF RESIDUE TO A. AND “SIX CHILDREN NOW LIVING” OF B.—ALL BUT ONE OF CLASS, DEAD AT DATE OF WILL—PRESUMPTION OF MISTAKE—REJECTION OF SPECIFIED NUMBER.

In re Sharp, Maddison v. Gill (1908) 2 Ch. 190. The Court of Appeal (Cozens-Hardy, M.R., and Buckley and Kennedy, L.JJ.) have affirmed the decision of Joyce, J. (1908) 1 Ch. 372 (noted ante, p. 279), to the effect that where a testator gives his residue to A. and the six children of B. “now living,” there being in fact only one child then living, the erroneous enumeration may be rejected, and the share given to the six will belong to the surviving one.

INTERNATIONAL COPYRIGHT—FOREIGN MUSICAL COMPOSITION—UNAUTHORIZED PERFORMANCE IN ENGLAND—BERNE CONVENTION, 1887, ARTS. 2, 11.

Sarpy v. Holland (1908) 2 Ch. 198 was an action brought for damages for infringement of an international copyright of a musical composition. Neville, J., held that the plaintiff had failed to support his copyright because the notice reserving copyright required by 45-46 Vict. c. 40, s. 1, was not printed on the published copies in English. The Court of Appeal (Cozens-Hardy, M.R., and Buckley and Kennedy, L.JJ.) held that in this view he was in error, because under the Berne Convention of 1887, and the orders in council adopting the same, the rights secured thereby to foreign composers is subject only to the conditions and formalities required by law in the country of the origin of the work; and on the true construction of the convention, the declaration forbidding public performance of the copyright composition, thereby required to be made on the title page, is sufficient if made in the language of the country of origin; and the provisions of 45-46 Vict. c. 40, consequently do not apply to foreign copyright musical compositions.

LANDLORD AND TENANT—COVENANT NOT TO ASSIGN WITHOUT CONSENT OF LESSOR—EXPROPRIATION OF LEASEHOLD SUBJECT TO COVENANT NOT TO ASSIGN—RIGHT OF EXPROPRIATORS TO ASSIGN LEASE WITHOUT CONSENT.

Metropolitan Water Board v. Solomon (1908) 2 Ch. 214. In this case the plaintiffs in pursuance of their statutory powers had

expropriated the interest of a lessee in certain leasehold premises, which were subject to a covenant by the lessee not to assign without the consent of the lessors. The plaintiffs subsequently found that they did not require the premises for their own use and proposed to underlet them to an intended tenant for the residue of the term less three days. The lessors on being applied to refused to consent to the under lease. The action was therefore brought for a declaration that the plaintiffs were entitled to make the proposed underlease without the lessor's consent. Joyce, J., however, dismissed the action, holding that the plaintiffs were not possessed of an absolute term of years, but merely of the estate and interest of the lessee whose rights they had expropriated, and that the term was subject to the liability of being terminated in the event of an assignment without the lessors' consent; and that the plaintiffs' statutory powers only enabled it to dispose of such estate or interest as they might have, and did not enable them to bar the defendant's right of entry for breach of the covenant in question.

PRACTICE—THIRD PARTY NOTICE—APPLICATION FOR LEAVE TO
SERVE THIRD PARTY NOTICE—SERVICE ON PLAINTIFF—EX
PARTE APPLICATION.

Furness v. Pickering (1908) 2 Ch. 224 seems to shew that hitherto there had been a different practice prevailing in the King's Bench and Chancery Divisions as to the mode of making applications for leave to serve third party notices; the rule apparently being to move ex parte in the King's Bench Division and on notice to the plaintiff in the Chancery Division. Joyce, J., was of the opinion that the application may properly be made ex parte in the Chancery Division, subject always to the jurisdiction to order the plaintiff to be notified if the court should see fit. In this case the action was against some directors of a company and the defendants sought to notify a co-director against whom they claimed contribution, and the order was made notwithstanding the opposition of the plaintiff.

COMPANY—ALLOTMENT OF SHARES—MINIMUM SUBSCRIPTION—
CHEQUES FOR SHARES NOT PAID BEFORE ALLOTMENT—DELAY
IN PRESENTMENT—INVALIDITY OF ALLOTMENT—NOTICE OF
AVOIDANCE WITHIN ONE MONTH—LEGAL PROCEEDINGS AFTER A
MONTH—COMPANIES ACT, 1900 (63-64 VICT. C. 48) SS. 4, 5—
(7 EDW. VII. C. 34, SS. 106, 107 (ONT.)).

In re National Motor Mail Coach Co. (1908) 2 Ch. D. 228 a shareholder made a summary application to cancel the allot-

ment of shares to him, on the ground that at the time the allotment was made, the minimum subscription had not been received in cash by the company, and that therefore the allotment was invalid under the Companies Act, 1900 (63-64 Vict. c. 48), ss. 4, 5 (7 Edw. VII. c. 34, ss. 106, 107 Ont.). It appeared that for part of the minimum subscription cheques had been given to the company, but for some unexplained reason these cheques had not been presented or paid to the company until after the allotment had been made. Notice of avoidance had been served on the company within a month after the statutory meeting of the company, but the legal proceedings were not commenced until after the month had expired. Eady, J., following *Mears v. Western Canada Paper Pulp Co.* (1905) 2 Ch. 360, held that the payment by cheques is not a payment in cash, and that the cheques not having been paid before the allotment, the allotment was voidable; and that it was a sufficient compliance with s. 5 (Ont. Act., s. 107), that the notice of avoidance had been given within the month after the statutory meeting of the company, although the legal proceedings had not been commenced until after the month had expired.

COMPANY—ALLOTMENT BEFORE MINIMUM SUBSCRIPTION PAID IN CASH—LIABILITY OF DIRECTORS—"KNOWINGLY CONTRAVENTE"
—COMPANIES ACT, 1900 (63-64 VICT. C. 48) SS. 4, 5—7 EDW. VII. C. 34, SS. 106, 107 (ONT.)).

Burton v. Bevan (1908) 2 Ch. 240 is another case arising out of the improper allotment of shares before the minimum subscription had been received in cash. In this case, however, the action was brought by a shareholder against a director for contravention of ss. 4 and 5 (ss. 106, 107, Ont. Statute), relating to the allotment of shares and the question was whether the defendant had "knowingly" contravened the Act. It appeared that the defendant was not present at the meeting of directors when the allotment was made, but had attended a subsequent meeting of which the minutes of the prior meeting were confirmed and a resolution passed to apply for a certificate to commence business, and it was held by Neville, J., that this act did not make the defendant liable for what had been done at the prior meeting and that on the facts had not been aware of the facts and had not knowingly been guilty of a contravention of the Act, and the action therefore failed.

IMPERFECT GIFT OF PERSONALTY—APPOINTMENT OF DONEE AS
EXECUTOR—BONDS PAYABLE TO BEARER—INTENTION TO GIVE.

In re Stewart, Stewart v. McLaughlin (1908) 2 Ch. 251. Neville, J., here holds that where a testator with the intention of benefiting his wife had shortly before his death purchased three bonds payable to bearer, which remained in his broker's hands, at the time of his death, and by his will he appointed his wife one of his executors, that this appointment, following *Strong v. Bird* (1874) L.R. 18 Eq. 315, had the effect of completing the imperfect gift of the bonds in favour of the wife, and he also held that the principle of *Strong v. Bird* is not confined to the case of the release of a debt due from the executor to the testator, and that it was immaterial that the donee is not the sole executor.

FRIENDLY SOCIETY—ARBITRATION UNDER RULES—COSTS—JURIS-
DICTION TO AWARD COSTS.

In *Catt v. Wood* (1908) 2 K.B. 458, the plaintiff, a member of a friendly society, claimed to restrain the officers of the society from suspending him from the society in the following circumstances. The Friendly Societies Act, 1896, provides that disputes between members and the society are to be settled in the manner provided for by rules of the society. The plaintiff and his son were members of a Foresters' Society which was within the Act, and by the rules of the society it was provided that disputes should be settled by arbitration and that the decision of the arbitration and appeal committee should be final, and that any member refusing to comply should be suspended. The rules also provided that the arbitration committee might order either party to an arbitration to pay costs. The plaintiff's son became lunatic and was removed to an asylum. The plaintiff, in his son's name, but really to recoup himself for his son's maintenance, applied to the society for sick pay, which claim was referred to arbitration and decided in the son's favour; and sick pay was awarded from a certain date. The plaintiff then claimed that it ought to commence earlier. This claim was also referred to arbitration and decided against the father, who was ordered to pay costs, which he refused to do and was suspended from membership under the rules. The plaintiff claimed that the rule providing for suspension was ultra vires, but Coleridge, J., who tried the action, held that it was not, and the Court of Appeal (Williams, Farwell and Kennedy, L.JJ.) affirmed his

decision, and it was also held that the plaintiff's claim against the society for sick pay was brought by him in his capacity as a member against whom an order for costs could properly be made, and that even if the claim was in strictness on the part of the son, the plaintiff was "a party" to the arbitration proceedings within the meaning of the rules and as such liable to be ordered to pay costs.

TRUSTEE AND CESTUI QUE TRUST—BREACH OF TRUST—CONFLICTING EQUITIES—LEGAL TITLE—NEGLIGENCE.

Burgis v. Constantine (1908) 2 K.B. 484 is an illustration of the maxim that where the equities are equal the law must prevail, and also of that other maxim "Qui prior est tempore potior est jure." In this case in furtherance of a project for the formation of a company to purchase a ship, the plaintiffs, who were the owners of shares in a ship, transferred them to one Wilfrid Hine, the senior partner in a firm of Hine & Co., which managed the ship's business, as trustee for them, with power to sell the shares if the company was formed, and Wilfrid Hine was registered as owner of the shares so transferred. The project of forming a company proved abortive; but the plaintiffs allowed the shares to remain in the name of Wilfrid Hine. Subsequently Alfred Hine, who acted as the manager of Hine & Co.'s business, procured Wilfrid Hine to sign a blank form of mortgage. This he took to Holman, an agent of the defendant, who filled it up as a mortgage to secure £4,000, on the faith of which the defendant advanced the £4,000 to Alfred Hine, which was used for the purposes of Hine & Co.'s business. The pretended mortgage was duly registered, and the plaintiffs brought the present action to set it aside, and for a declaration that it was null and void, and that the defendant was not entitled to be registered as mortgagee. Bigham, J., who tried the action held that the mortgage in question having been executed in blank was null and void, but he considered that the defendant was, nevertheless, entitled to an equitable charge on the ship for the money advanced, and so ordered. The Court of Appeal (Barnes, P.P.D., and Moulton and Farwell, L.JJ.) reversed his decision, in so far as it awarded a charge in favour of the defendant. As the Court of Appeal points out, the mortgage being a nullity, although Wilfrid Hine might be liable in damages on an agreement to give a mortgage to secure the money advanced, yet not being the beneficial owner of the ship, the contract could not have been specifically enforced as against him.

**PRACTICE—BILL OF COSTS—SOLICITOR AND CLIENT—COUNSEL FEES
UNPAID AT TIME OF DELIVERY OF SOLICITOR'S BILL.**

In *Sadd v. Griffin* (1098) 2 K.B. 510 the Court of Appeal (Moulton and Farwell, L.JJ.) have decided that it is improper for a solicitor to include in his bill of costs delivered to his client counsel fees which have been incurred, but not actually paid when the bill is delivered, and in so doing reversed the contrary decision of Jelf, J.

PRINCIPAL AND AGENT—STOCK BROKER—RIGHT OF BROKER TO INDEMNITY FROM CUSTOMER—PAYMENT MADE BY BROKER WITHOUT CUSTOMER'S AUTHORITY.

In *Johnson v. Kearley* (1908) 2 K.B. 514 the Court of Appeal (Barnes, P.P.D., and Moulton and Farwell, L.JJ.) have affirmed the judgment of Bucknill, J., (1908) 2 K.B. 82, noted ante, p. 485, Farwell, L.J., however, dissented; as intimated in the previous note of the case, the decision of the majority of the court it is to be feared will hardly commend itself to the common sense of the ordinary stock broker, and even Barnes, P.P.D., is constrained to admit that the plaintiff's case was destitute of merits.

PRINCIPAL AND AGENT—LUNATIC NOT SO FOUND—PERSON APPOINTED UNDER LUNACY ACT TO CARRY ON BUSINESS OF LUNATIC—PERSONAL LIABILITY OF AGENT.

In *Plumpton v. Burkinshaw* (1908) 2 K.B. 572, the defendant had been appointed under the Lunacy Act, 1890 (53-54 Vict. c. 5), ss. 116, 120, 124, to carry on the business of a lunatic not so found. The business was carried on in the name of a firm, and the defendant ordered goods in the name of the firm from the plaintiff for the price of which the action was brought against the defendant personally. The action was tried by Sutton, J., who held that the defendant was not liable, and his decision was affirmed by the Court of Appeal (Barnes, P.P.D., and Moulton and Farwell, L.JJ.) on the ground that the effect of the order in lunacy was to constitute the defendant agent for the lunatic, and in the absence of any evidence of intention on the part of the defendant to pledge his personal credit, or hold himself out as principal, he was not liable.

PRACTICE—ACTION BY FIRM—ORDER FOR DISCOVERY—REFUSAL OF ONE PLAINTIFF TO MAKE DISCOVERY—APPLICATION BY CO-PLAINTIFF FOR ATTACHMENT—JURISDICTION.

Seal v. Kingston (1908) 2 K.B. 579 presents a somewhat peculiar state of facts. It was an application by a plaintiff to

commit his co-plaintiff for contempt in not obeying an order for discovery obtained by the defendant. The plaintiffs were members of a firm, but the disobedient plaintiff had refused to allow his name to be used as plaintiff except on the terms of being first indemnified against liability for costs by his co-plaintiff. An order for a better affidavit on discovery of documents had been obtained by the defendant and served in the usual way, with which the recalcitrant plaintiff declined to comply. It was, of course, objected that the order having been obtained by the defendant it was not competent for a plaintiff to take proceedings to enforce it. And Ridley, J., appears to have adopted that view, and refused to make any order, on the ground of his supposed want of jurisdiction. The Court of Appeal (Barnes, P.P.D., and Farwell, L.J.), however, came to the opposite conclusion, and held that the application might properly be entertained.

STATUTE OF LIMITATIONS—21 JAC. I. c. 16—(R.S.O. c. 324, s. 38)

—PAYMENT OF CHEQUE POSTPONED—DATE OF PAYMENT—IM-
PLIED PROMISE TO PAY BALANCE OF DEBT—9 GEO. IV. c. 14,
s. 1—(R.S.O. c. 124, s. 1).

Marreco v. Richardson (1908) 2 K.B. 584. This was an action brought on a solicitor's bill and the question at issue was whether or not the claim was barred by the Statute of Limitations, 21 Jac. I., c. 16 (R.S.O. c. 324, s. 38). On May 10, 1900, a cheque in part payment was given by the defendant to the plaintiff's testator, and at the same interview it was verbally agreed that the cheque should not be presented for payment before 20 June. On 20 June, 1900, the cheque was paid. The action was commenced on 18 June, 1908, the case, therefore, turned on the point whether the payment for the purpose of taking the case out of the statute was to be deemed to have been made on 10 May or 20 June. Bray, J., who tried the action held that it must be taken to have been made on the 10 May, and therefore that the plaintiff's claim was barred, and the Court of Appeal (Barnes, P.P.D., and Moulton and Farwell, L.J.J.) affirmed his decision.

NEGLIGENCE—WATER COMPANY—LIABILITY TO RE-INSTATE PAVE-
MENT—SUBSIDENCE—OMISSION OF MUNICIPAL AUTHORITY TO
REPAIR.

Hartley v. Rochdale (1908) 2 K.B. 594 was an action brought by the plaintiff against the defendants, who supplied water to a

municipality, for damages occasioned by the plaintiff falling owing to a subsidence of the pavement, caused by the defendants. By their special Act the defendants were bound to restore pavements taken up by them, for the purpose of their works, to a proper condition, and in case of any subsequent subsidence within twelve months were bound to make necessary repairs. In October, 1904, an excavation was made by the defendants. In July, 1905, the defendants instructed the road authority to re-instate the flags, which they did at the defendants' expense. From that time till June, 1907, when the accident happened to the plaintiff, nothing was done. The judge of the County Court found that the accident happened owing to the pavement being out of repair and that this had been the case ever since October, 1905, and that the state of the pavement was due to the defendants not having duly performed their statutory duty to restore the pavement to proper repair, and he consequently held that the plaintiff was entitled to recover damages against the defendants, and that the omission of the road authority to make necessary repairs afforded the defendants no defence, and with this conclusion a Divisional Court (Darling and Phillimore, JJ.) agreed.

CONTRACT—COST OF "GENERATING LIGHT"—"ACTUAL COST."

Bulawayo v. Bulawayo Waterworks Co. (1908) A.C. 241 was an appeal from the Supreme Court of the Cape of Good Hope. The point in dispute was the construction of a contract under which the defendants contracted to furnish the plaintiff corporation with electric light for street lamps on the terms of being paid a price therefor "at such rates as will yield to the contractors a return equal to 10 per cent. over the actual cost of generating light." The Colonial court held that the generating of the light included all operations for the production of the light at the street lamps and that "the actual cost" included all that the production of the light cost including depreciation of plant, rent, taxes and insurance of works, and the Judicial Committee affirmed the decision.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL

Moss, C.J.O., Osler, Garrow, Maclaren, J.J.A.]

[From Teetzel, J.

FARAH v. GLEN LAKE MINING CO.

Crown patent—Mining land—Trespass—Counterclaim to set aside patent for fraud, error or improvidence—Jurisdiction of High Court—Parties—Attorney-General—Fiat—Con. Rule 241—Land Titles Act—Bonâ fide purchaser for value without notice—Injunction—Damages.

In all cases of patents for lands issued through fraud or in error or improvidence, the High Court has power, under ss. 41, 42 of the Judicature, notwithstanding the repeal and non-re-enactment in terms of s. 29 of R.S.O. 1877, c. 23, in an action instituted in respect of such lands situate within its jurisdiction, to declare such patents to be void, and this remedy may be accorded in an action by a private individual, to which the Attorney-General may or may not be a party, but to the institution of which his consent is not necessary. The operation of Con. Rule 241 may properly be confined to cases in which it may be necessary to resort for remedy to a writ of scire facias.

In an action to restrain the defendants from trespassing or mining upon or removing ore from a small parcel of land in a mining district, the defendants disputed the plaintiffs' title and asserted title in themselves as assignees of the mining claim of one C., comprising the parcel in dispute. The defendants also counterclaimed, alleging inadvertence, omission, or mistake and claiming a declaration that the letters patent obtained by the plaintiffs did not give them the title to the parcel in dispute, or that, if they did, the letters patent should be repealed, in so far as the parcel in question was concerned, and an injunction and damages.

Held, that the matters set up by the defendants in their counterclaim would properly form the subject of an action which might have been instituted by the defendants, without obtain-

ing the Attorney-General's fiat or his consent in any other form, in respect of the patent for land granted by the Crown to the plaintiffs, and, that being so, the counterclaim was maintainable in this action, without the necessity of adding the Attorney-General as a party or of obtaining his fiat or consent.

Held, however, upon the evidence, that the plaintiff E., who acquired the interests of the original plaintiffs in the land in question pendente lite, did so for value and without notice of the action or counterclaim, and therefore, having regard to the provisions of the Land Titles Act, under which the plaintiffs' title was registered, he was in the position of a registered purchaser for valuable consideration without notice, and the relief sought by the counterclaim could not be enforced as against him, the right to an injunction followed upon his ownership of the land, but neither he nor his co-plaintiffs were entitled to damages.

Judgment of TEETZEL, J., varied.

W. M. Douglas, K.C., and E. J. Hearn, K.C., Wallace Nesbitt, K.C., A. M. Stewart, R. McKay and C. H. Ritchie, K.C., for the various parties.

Moss, C.J.O., Osler, Garrow, Maclaren, JJ.A.]

[From Riddell, J.]

MORITZ v. CANADA WOOD SPECIALTY CO.

Foreign judgment—Action on—Judgment recovered in England against defendants in Ontario—Jurisdiction—Breach of contract—Place of performance—Service out of the jurisdiction—English Order XI., Rule 1 (e)—Alternative claim on original cause of action—Merger—Election—Appeal—Parties.

Under Order XI., Rule 1 (e), of the English Rules of the Supreme Court, 1883, which corresponds substantially with Rule 162(e) of the Ontario Consolidated Rules of 1897, providing that service out of the jurisdiction of a writ of summons may be ordered whenever the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, it is not necessary in order to confer jurisdiction to shew that the whole of the contract is to be performed within the jurisdiction; it is sufficient if there is a breach of that part of it, if any, which is to be performed

there; but the action must be based on such a breach, and the jurisdiction of the home court is not attracted in respect of a breach of that part of the contract which is to be performed abroad, by reason of a breach of another part of it which is to be performed within the jurisdiction.

The plaintiff, living in England, brought an action in England against the defendants, an incorporated company, doing business in Ontario, for damages for breach of contract to deliver certain goods. By the terms of the contract the delivery was to be at the port of shipment in America, and payment was to be made on receipt of and in exchange for shipping documents in England.

Held, that the breach upon which the action was based took place at the American port, and the defendants, not having been subject to the English court either by residence or submission in the contract, there was no jurisdiction in that court under Order XI. to summon the defendants to appear before it, or to entertain the action, and the judgment obtained in England in that action (the defendants not appearing), however effectual it might be in England, not having been moved against there, was of no avail to support an action upon it in Ontario.

Held, however, that the original cause of action had not merged in the judgment, and the plaintiff was entitled to succeed upon an alternative claim thereupon, made in the action brought in Ontario on the English judgment.

The trial Judge held both causes of action to be proved, and the plaintiff elected to take judgment in respect of the claim based upon the English judgment.

Held, that the plaintiff was not so bound by his election that he was prevented from taking judgment upon the alternative claim when he was held by the Court of Appeal, upon the defendants' appeal, not entitled to succeed upon the English judgment.

Held, also, that an order was properly made at the trial adding as plaintiffs the personal representatives of the original plaintiff, who died after the commencement of the action, and that the action was properly constituted.

Judgment of RIDDELL, J., varied.

Lynch-Staunton, K.C., for defendants, appellants. *Kirwan Martin*, for plaintiffs.

Moss, C.J.O., Osler, Garrow, Maclaren, Anglin, J.J.A.]

[From Divisional Court.]

FOSTER v. ANDERSON.

Vendor and purchaser—Contract for sale of land—Time of essence—Time for completion—Delay of purchaser—Default of vendor to tender—Conveyance—Duty as to preparation—Misdescription of land—Statute of Frauds—Misrepresentation—Mistake—Specific performance.

The contract for the sale and purchase of land set up by the plaintiff, the purchaser, consisted of a written offer by him to buy and a written acceptance by the defendant of his offer. The offer contained, inter alia, the following provisions: "This offer to be accepted by Sept. 25, A.D., 1906, otherwise void, and sale to be completed on or before the 10th day of October, 1906." "Time shall be of the essence of this offer." "Deed . . . to be prepared at the expense of the vendor and mortgage at my expense."

Held, that time was of the essence as to all the terms of the contract, but that the duty of the purchaser to make tender of his purchase money did not arise until the vendor had done that which it was incumbent upon her to do to put herself in a position to complete the sale; it was her duty to prepare the conveyance and submit the same for approval, having regard to the provision last quoted, and having failed to do so, her default precluded her from setting up the lapse of the time at which the sale should have been completed as an answer to the plaintiff's claim for specific performance.

Among the words of description of the parcel of land in question, the contract contained the words, "being the premises known as number 22 Ann street." The correct number was 24, there was no number 22, and the defendant owned no other property in Ann Street.

Held, that there being a description which identified the parcel without the aid of the street number, the words quoted might be rejected as surplusage, and there remained sufficient, with parol evidence, to satisfy the Statute of Frauds.

OSLER, J.A., dubitante.

Held, also, upon the evidence, that misrepresentation and mistake such as would afford ground for refusing specific performance were not shewn.

Judgment of a Divisional Court, 15 O.L.R. 362, awarding specific performance affirmed.

G. H. Watson, K.C., and F. J. Roche, for the defendant, appellant. A. H. Marsh, K.C., and W. J. Clark, for the plaintiff.

Full Court.]

[July 6.

CANADIAN RAILWAY ACCIDENT CO. *v.* KELLY.

*Practice—Commission to take evidence of plaintiff abroad—
Application for—Material for, sufficiency of.*

Appeal from the order of DUBUC, C.J., affirming the order of the referee granting the plaintiffs' application for the issue of a commission to take the evidence of the plaintiffs' officers and employees at Ottawa, Ontario, and of the plaintiffs' books there. The head office of the plaintiffs was in Ottawa.

This action was to compel the defendant to account for certain moneys received or which should have been collected by him as the local agent of the company in Winnipeg, and the plaintiffs filed affidavits tending to shew that the books were in constant use at the head office and could not be brought to Winnipeg without great inconvenience and loss, also that it would be practically impossible to carry on the business of the company at its head office if all the officers, whose evidence would be necessary at the trial, had to be absent from the head office in order to attend the trial in Winnipeg.

By the court.—A plaintiff suing in a foreign forum should not ordinarily be excused from appearing there and giving his evidence: per Chitty, J., in *Ross v. Woodford* (1894), 1 Ch., at page 42. The proof that the interests of justice require the issue of the commission to take the plaintiffs' evidence abroad should be of the clearest kind and there should be evidence, not upon information and belief, but of the best nature that could be got. The issue of such a commission should be the exception and should only be resorted to when the inconvenience or expense would otherwise pretty nearly thwart the ends of justice. *Keeley v. Wateley*, 9 Times L.R. 571, followed.

The court was not satisfied that all the books must be kept at the head office of the company all the time, and it appeared probable that, if the evidence were taken at Ottawa on commission, the defendant might have to go there himself in order to instruct counsel on cross-examination of the witnesses as to the entries in the books.

Held, that the material was insufficient to warrant an order for the commission asked for and that the appeal should be allowed with all costs to the defendant in any event of the cause.

Semble. If a proper case were made out, an order might go for the examination of some of the officers of the company at

Ottawa on some of the facts which the plaintiffs wished to prove, and that the books, or at all events all those that were not absolutely required all the time at the head office, might be brought to Winnipeg with the other officers to verify them so that the court might see the original books instead of certified copies of portions of them.

Foley, for plaintiffs. *O'Connor* and *Blackwood*, for defendant.

HIGH COURT OF JUSTICE.

Divisional Court, K.B.]

[July 2.]

RE STREET AND NELSON.

Will—Devise to wife for life with remainder to surviving children and to issue of children dying before testator and his wife.

A testator devised all his estate to his wife for her support for life, and for the maintenance and education of his children, and on her death to be equally divided amongst the children. By a codicil he directed that if M., a married daughter, should die before both her parents, leaving a child or children, they should receive her portion. On testator's death, he, having predeceased his wife and children, sold a portion of the lands, and joined in the conveyance to the purchaser. On a petition under the Vendors and Purchasers' Act.

Held, that the conveyance was effective to pass the fee.

Cavell, for purchaser. *Hasard*, for vendor.

Divisional Court, K.B.]

[From Teetzel, J.]

SAVEREUX v. TOURANGEAU.

Deed—Fraud—Conveyance of same land to two purchasers—Priorities—Option—Agreement—Registration—Action to remove cloud on title—Leave to amend—Parties—Grantor—Specific performance—Terms.

By a writing under seal, but without consideration, dated Jan. 2, 1907, M. covenanted and agreed with the plaintiff that if at any time he (M.) should be desirous of selling the land described in the document, he would give the plaintiff the option of first chance to purchase the same at \$40 per acre, and to give the plaintiff 30 days' notice in writing of intention to sell

the property, etc. On Jan. 14, 1907, M. signed a written offer, binding for 3 months from the date, to sell the same land to the defendant at a larger price. On the following day, but after the defendant had express notice of the agreement with the plaintiff, M. executed a formal written agreement to sell the land to the defendant, and the defendant, two days later, paid part of the consideration named, and received from M. a conveyance of the land. The plaintiff's agreement or option and the defendant's agreement of Jan. 15, were both registered on Jan. 15, and the defendant's deed on Jan. 17. On April 22, 1907, M. conveyed the same land to the plaintiff, and received a payment on account from the plaintiff, this conveyance was registered on April 24, 1907. In an action to set aside the defendant's agreement of the Jan. 15, and the deed registered Jan. 17, as being void, and to remove the same as a cloud upon the plaintiff's title.

Held, that the writing of Jan. 2, was not a mere option but a contract with the plaintiff to give him a binding option for 30 days after notice of desire to sell, and, being under seal, there was no need for a consideration; that the defendant took his agreement and conveyance subject to the rights of the plaintiff; but that these instruments were not tainted with fraud, and could not be declared void, as the defendants had full notice of the agreement of Jan. 2, he was thereafter in the same position quoad the plaintiff as M. had previously been, and was bound to do the same acts as M. in respect of the land, and, while the plaintiff's action as framed failed, his remedy lay in a claim for specific performance against the defendant and M., and he was allowed to amend, upon terms, by adding M. as a party and seeking the remedy suggested.

Judgment of TEETZEL, J., reversed.

F. E. Hodgins, K.C., for defendant. *R. F. Sutherland*, K.C., for plaintiff.

Province of Nova Scotia.

SUPREME COURT.

Longley, J.]

EVILLE v. SMITH.

[July 24.]

Will—Words “leave no issue him surviving”—Construction.

The last will and testament of B.S. devised all the rest and residue of his estate to be kept invested until the death of one

or other of his sons, J.M.S. and C.D.S., and directed that upon the decease of one of them who should first die one-half part of the residuary estate should be divided among the children of the one so dying in equal shares. It then proceeded, "And in the case the one so dying shall leave no issue him surviving, then the said share shall go to the surviving brother for his life and at his decease shall be divided among his children in equal shares. I desire and direct that upon the decease of the surviving son of my said two sons, the other half part of the said residuary estate shall be divided among the children in equal shares and in case he shall leave no issue him surviving the said half part shall be divided among the children of the other deceased brother."

Held, that the words "shall leave no issue him surviving" must be interpreted "shall leave no children him surviving," and consequently that no interest under the residuary clause extended beyond the children of J.M.S. and C.D.S., and that existing or unborn children who might have interests by the death of all the children of J.M.S. before his death or all the children of C.D.S. before his death had no interests which the court was bound to regard.

H. McInnes, K.C., for plaintiff. *R. E. Harris*, K.C., & *W. B. Ritchie*, K.C., *W. M. Christie*, K.C., and *T. W. Murphy*, for various parties.

Graham, E.J.]

IN RE JAMES LING.

[July 28.

Judgment recorded to bind land—No steps taken for upwards of 20 years—Expropriation—Parties entitled to money paid into court.

In April, 1858, the holders of a mortgage upon land of J. L. brought an action of ejectment against him and recovered judgment by default, he not having appeared. No step was taken upon this judgment except to register it; no execution was issued upon it, no possession taken under it and it was never revived.

J. L. continued in possession until 1879, more than 20 years after the recovery of the judgment, and then went to live with a son, the actual possession of the property being abandoned after he moved away.

In 1864 the mortgagees assigned their judgment in ejectment to T. L., a son of J. L.

The Dominion Coal Co. expropriated the land and paid the compensation money into court under provisions of the Mines Act and there was a contest as to who was entitled to the money.

Held, that the judgment in ejectment after the expiration of 20 years from its date could not be enforced.

Assuming after J. L. moved away that for many years there was no one in actual possession, the possession must be deemed to have been in those having the legal title, the heirs of J. L.

That acts of possession under a deed given subsequently to 1907 by T. L. were not sufficient to displace the legal title of the heirs of J. L. among whom, and their assignees, the fund should be distributed.

H. Mellish, K.C., W. H. Covert, T. R. Robertson and Finlay McDonald, for various parties.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] POLIQUIN *v.* ST. BONIFACE. [May 20.
*Specific performance—Pleading—Estoppel by signing lease—
New trial.*

In answer to the plaintiff's demand for specific performance of an alleged agreement of sale of land to him, the defendant, among other defences, set up that, "if the plaintiff was at any time in possession of the land, he was in possession only as tenant of the defendant under a lease in writing made between the defendant and the plaintiff."

At the trial before CAMERON, J., on cross-examining the plaintiff defendant's counsel produced a lease from defendant to plaintiff of the lands in question. This lease was dated some years subsequent to the date of the alleged purchase and was for a term which had expired before the commencement of the action. The plaintiff admitted his signature to the lease, but said he could not read English and that he had been induced to sign the document by misrepresentation as to its nature.

The trial judge was of opinion that plaintiff, so far as this action was concerned, was effectually concluded by the lessee and dismissed the action with costs.

Held, on appeal, 1. That the defence above quoted did not amount to a plea of estoppel.

2. That in any event the lease having expired before the commencement of the action, there was no estoppel.

New trial ordered. Costs to be costs to plaintiff in any event of the cause. Defendant to have leave to amend.

A. B. Hudson and Anderson, for plaintiff. Potts, for defendant.

Full Court.]

REX v. CLEGG.

[June 8.

Money Lenders Act—Assignment of salary—Evidence of loan—Evidence that accused made a practice of lending at usurious rate—Oral testimony to explain written contract.

The accused was prosecuted under the Money Lenders Act, R.S.C. 1906, c. 122, for lending \$35.00 to Hubert Weiss on a contract on agreement calling for the repayment of \$56.00 by 20 weekly payments of \$2.80 each, thereby exacting a rate of interest greater than that authorized by the said Act. The contract signed by Weiss was in the form of an assignment of his monthly salary for several months to commence at a later date which was not to be acted on or notified to his employer in case Weiss should make the stipulated payments of \$2.80 per week, the first of which was to be made in four days after the advance was made. There was no covenant to make these payments. Oral evidence and the entries in the books kept by the accused were admitted to shew the true nature of the transaction. It was contended on behalf of the accused that the transaction was a purchase and not a loan, inasmuch as the assignee would be without remedy if the borrower should die or fail to earn any salary, and she objected to the admission of the oral and other testimony to contradict or explain the contract.

Held, that the oral testimony and book entries were admissible, and they together with the assignment were sufficient evidence of a loan within the meaning of the Act; but that, as no evidence had been given to shew that the accused had made a practice of lending money at a higher rate than ten per cent. per annum, the prosecution had failed and the conviction must be quashed.

Patterson, D.A.-G., for the Crown. McMurray, for the prisoner.

Full Court.] ANCHOR ELEVATOR CO. v. HENNEY. [July 6.

Jurisdiction—Service of statement of claim out of the jurisdiction—King's Bench Act—Tort—Fraudulent preference—Chattel mortgage given within the jurisdiction to non-resident.

This was an action to set aside a chattel mortgage given within the jurisdiction to the defendant, whose domicile was in the Province of Quebec, by the debtors, resident in Manitoba, against whom the plaintiffs had recovered a judgment, on the ground that the same was a fraudulent preference under the Assignments Act. The defendant had taken no steps to get possession of the mortgaged goods which were within the jurisdiction.

On defendant's motion to set aside the service of the statement of claim the referee had made an order requiring the plaintiffs to prove at the trial of the action a tort committed in Manitoba within the provisions of Rule 201(e) of R.S.M. 1902, c. 40, or a transfer or conveyance by way of chattel mortgage made in Manitoba fraudulent at common law or under any statute, and that, in default of such proof, there should be a nonsuit and allowing the service to stand.

Held, on appeal from that order, that the mere taking of the chattel mortgage was not a tort, that there was no jurisdiction to proceed in the action against the defendant, and that the order should be set aside with costs.

Emperor of Russia v. Proskomiakoff, ante, pp. 359, 506 followed. *Clarkson v. Dupré*, 16 P.R. 521, distinguished.

McClure, for plaintiffs. *Coyne*, for defendant.

Full Court.] HAFFNER v. COEDINGLEY. [July 6.

Commission on sale of land—Meaning of words "completion of the sale."

Appeal from judgment of MATHERS, J., noted ante, p. 323, dismissed with costs.

A. J. Andrews and Macneill, for appellants. Munson, K.C., and Haffner, for respondents.

KING'S BENCH.

Mathers, J.]

NICHOLSON v. PETERSON.

[July 7.

Fraudulent representation—Sale of land—Rescission of contract.

Action to set aside a sale and transfer of land from the plaintiff to the defendant Roger and by him to the defendants Peterson on the ground of fraud. The defendant Peterson wished to acquire the land in question, which adjoined their foundry and machine shops, and, knowing that the plaintiff would not sell to them, because they would be likely to make such use of the land as would be detrimental to the remaining adjoining property of the plaintiff, employed the defendant Roger to buy, if possible. Roger then entered into negotiations with the plaintiff for the purchase in his own name. When the plaintiff inquired if he was buying for the Petersons, Roger denied it and declared he would not sell to them in any event. Plaintiff asked Roger to formally restrict himself from selling to the Petersons, but Roger refused to buy subject to any restrictions. Plaintiff believed Roger's statement that he wanted the land to build houses on for himself, and closed the sale to Roger, who immediately conveyed the land to the Petersons.

Held, that, if Roger's statements had been true, there was nothing to prevent him from changing his mind the next day and selling to the Petersons, and therefore the false representations he made were not material to the contract, nor did any damage result to the plaintiff as the immediate and direct consequence of the representations, and that the action must be dismissed, but without costs. *Bell v. Macklin*, 15 S.C.R. 576, followed.

A. J. Andrews and *Burbidge*, for plaintiff. *Anderson*, for Roger. *Pitblado*, for Petersons.

Book Reviews.

Real Property. An introductory explanation of the law relating to land, by ALFRED F. TOPHAM, LL.B., with test questions for the use of students by F. PORTER FAUCETT, B.A. London: Butterworth & Co., Bell Yard, Law Publishers.

This is a book for students, covering in outline the whole ground of real property law. It will be exceedingly helpful to

those desiring a bird's eye view of this most difficult subject. As the author truly says: "A student who approaches the study of the law of land by reading at the outset such a standard work as Williams on Real Property is apt to get confused by the wealth of detail and the extraordinary complication and formality of the early law." Students will re-echo this statement and agree with the writer in the *Law Quarterly Review*, who says: "The law of real property has always been an unpalatable dish for beginners owing to its strange mixture of mediæval theory and modern practice." Students will appreciate the efforts of Mr. Tophan in their behalf.

Leading cases in Constitutional Law, briefly stated with introduction and notes by ERNEST C. THOMAS. 4th edition by Chas. L. Attenborough. London: Stevens & Haynes, Temple Bar, 1908.

Only one case of special interest referring to the South African War has been noted since the previous edition.

Two Studies in International Law, by COLEMAN PHILLIPSON, M.A. London: Stevens & Haynes, Law Publishers, Temple Bar, 1908.

This consists of two essays on the subject of International Law: (1) The influence of international arbitration on the development of international law; (2) The rights of neutrals and belligerents as to submarine cables, wireless telegraphy and intercepting of information in time of war. The author publishes also the proceedings of the Second Hague Conference in reference to the above subjects.

As will be seen from these titles the discussion is on subjects which have largely come into existence within a comparatively short period of years and the information collected is therefore largely new, and is collected from many sources and is now easily accessible.

An Analysis of Williams on the Law of Real Property, for the use of students, by A. M. WILSHERE, LL.D. London: Sweet & Maxwell, Limited, 3 Chancery Lane, 1908.

This does not pretend to be more than an assistance to the memory of the student who has read the parent work, being a note book and nothing more. But it is a refresher which lawyers as well as students may usefully turn to when the occasion offers.

Bench and Bar.

Sir Louis Amable Jette, K.C.M.G., of Quebec, to be puisne judge of the Superior Court of the Province of Quebec in the room and stead of Sir C. A. P. Pelletier, K.C.M.G., resigned.

Dominique Monet, of the City of Montreal, barrister-at-law, to be puisne judge of the Superior Court of Quebec, in the room and stead of the Hon. E. Z. Paradis, deceased.

United States Decisions.

CHATTEL MORTGAGE—On the much-disputed question whether a chattel mortgage fraudulent as to a portion of the property may be upheld as to the remainder, it is held, in *Eastman v. Parkinson* (Wis.) 113 N.W. 649, 13 L.R.A. (N.S.) 921, that a chattel mortgage of stock in trade and other property, not characterised by actual fraud as to creditors of a mortgagor, may be constructively fraudulent as to them respecting the stock, and valid as to the other property.

CONTRACT.—To render a transaction voidable on account of the drunkenness of a party to it, it is held, in *Martin v. Harsh*, 231, Ill. 384, 83 N.E. 164, 13 L.R.A. (N.S.) 1000, that the drunkenness must have been such as to drown reason, memory, and judgment, and to impair the mental faculties to such an extent as to render the party non compos mentis for the time being.

Flotsam and Jetsam.

For the first time since the days of Pitt, it is said, an English lawyer has now become Prime Minister of England. The new Premier, Herbert H. Asquith, is recognized as a man of unusual ability and force. Other eminent lawyers hold some of the most important positions in the new ministry. David Lloyd-George is Chancellor of Exchequer; Augustine Birrell, K.C., is Secretary for Ireland; Lord Loreburn is High Chancellor; Sir Henry H. Fowler is Chancellor of the Duchy of Lancaster; Reginald McKenna, First Lord of Admiralty, and Richard B. Haldane, Secretary of State for War.

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"CASTLES IN THE AIR."

Castles in the air have heretofore been usually considered mere creatures of the brain, with no substantial existence; the Supreme Court of Canada has, however, recently determined that under the Statute of Limitations of Ontario a good legal title by possession may be acquired to a castle in the air. So that we see such structures have ceased to be mere creatures of imagination and become a matter of mundane interest, and actions of ejectment for castles in the air, and for injunctions to restrain interference with the possession or enjoyment thereof, may be looked upon as legitimate branches of our legal procedure.

Every man's house, as we all know, is his "castle," a room is also, as we all know, a structure above the ground and is more or less "in the air." If it is in an upper storey of a house it is very much "in the air," and if it happens to be a man's house it is a veritable "castle in the air," and it is to the legal rights respecting such a structure that the Supreme Court of Canada has been applying the resources of its legal lore, and has solemnly determined by a majority of its members that such a structure is not merely "a castle in the air," but is actually "land," to which a possessory title may be acquired under the Real Property Limitations Act. But for this solemn decision, we should have been tempted to think that such a proposition was ridiculous, but courts of law have, by their decisions before now, made the law what the celebrated Mr. Bumble was pleased to term "a ass."^{*}

The case in which this interesting conclusion was reached is *Iredale v. Loudon*, 40 S.C.R. 313, on an appeal from the Court of Appeal of Ontario, reported in 15 O.L.R. 286.

^{*}See, for example, the comment of Jessel M.R., in *Couldery v. Bartons*, 45 L.T. 690, on the doctrine of *Cumber v. Ware*, 1 Str. 426; and cf. Ont. Jud. Act, s. 58(8).

Before proceeding to discuss the legal aspect of the case we will briefly state the facts.

The plaintiff and defendants were brothers and sisters, and originally owned as tenants in common a parcel of land on which was erected a building. The plaintiff sold his share to the defendants; but after the sale he was allowed to continue in possession of an upper room in the building erected on the land; this room he used as a workshop, for which he at first paid rent, but since 1890 had ceased to do so. The room was reached by a stairway from the street which the defendant was accustomed to lock at nights, and he also kept the door of the upper room locked when not using it. The defendants were in possession of the rest of the building including the part immediately beneath the room occupied by the plaintiff, and they in the exercise of their rights as owners were about to tear down the building, which would have had the effect of demolishing the room occupied by the plaintiff; and the action was therefore commenced to restrain them from so doing, and the case has been well litigated. It was tried before Mabee, J. The plaintiff, besides an injunction, claimed a declaration that he was entitled as owner in fee to the workshop. Mabee, J., granted the injunction, but refused to make any declaration of title. This judgment was reversed by the unanimous judgment of the Court of Appeal (Moss, C.J.O., Osler, Garrow and Maclaren, JJ.A.), whose judgment has now been reversed by a majority of the judges of the Supreme Court (Fitzpatrick, C.J., and Davies and Duff, JJ.) (Maclaren and Idington, JJ., dissenting). Three judges have therefore overruled the decision of six other judges.

The conclusion of the Supreme Court of Canada was, in short, that under the Statute of Limitations by ten years' possession a title may be acquired to a room in a house and also to easements of support and access, notwithstanding that the owner has been all the time in actual occupation of the rest of the building. In other words, if a man takes another into his house and assigns him a bedroom, if he occupies it for ten years without paying rent or giving any written acknowledge-

ment of title, he will have acquired by virtue of the Statute of Limitations a possessory title to his room; such a result will appear to the man in the street an instance of the truth of Mr. Bumble's remark. The "man in the street," we are inclined to think, would not unnaturally suppose that the owner in possession of a house, when he ceased to be willing that another person should continue in his house, would have the right to say to him, "go," and if he did not go, he might send for a policeman and make him go, no matter how long his occupancy might have lasted; and, but for the decision of the Supreme Court of Canada, we should have been inclined to think the man in the street was right.

Mr. Justice Duff, who delivered the judgment in which the Chief Justice concurred, opens his remarks by saying:—

"It is, I think, too late to dispute the proposition that an upper room not resting directly upon the soil, but supported entirely by the surrounding parts of a building might at common law be the subject of a feoffment and livery as a corporeal hereditament, that is to say, *as land*; Co. Litt. 48*b*; Sheppard Touchstone, 202; 1 Preston Estates, 8, 506; *Yorkshire Life v. Clayton*, 8 Q.B.D. 421. Subsequently he remarks: "If you have a subject which is land and such a possession of that subject, I think the ground is clear for the operation of the statute."

And the judgment of the majority of the court proceeds on the basis that a room in a house is "land," and therefore within the operation of the Real Property Limitation Act.

In the Court of Appeal two of the learned judges expressed doubt whether the Statute of Limitations had any application. Moss, C.J.O., says: "As to the claim of ownership of the upper flat, it is very doubtful if the statutes are applicable. Very little light is afforded by decisions, but so far as they go they favour the proposition that a grant of an upper room or flat in a building passes no estate or interest in the land. This has been held as respects a lease, although it has also been held that an agreement for such a lease is a contract for an interest in land within the 4th section of the Statute of Frauds. But it

is said that this interest must not be construed as meaning an interest or share in the subjacent soil forming the site of the house or building in which the room or flat is situate. And if that be so the case is not within the definition of land in section 2 (1) of the Real Property Limitations Act." And Garrow, J., remarked: "It is clear that unless the plaintiff is now able to make good his right whatever it is against the lower floor, or soil as well as to the upper floor, his claim must wholly fail, for it would be absurd to hold that he has acquired a title to the upstairs alone, which right the defendants might immediately destroy by pulling down the walls of the lower story. A claim wholly 'in the air' and without reference to the soil or surface could not be made under the statute."

The Supreme Court of Canada has got over this difficulty by declaring that the right of possession of the room draws with it a right of support.

With the greatest respect to the majority of the learned judges of the Supreme Court we venture to doubt whether they have correctly interpreted the passages from Coke and Preston which Mr. Justice Duff referred to as establishing that an upper room is "land."

The passage in Coke Lit. is as follows: "A man may have an inheritance in an upper chamber, though the lower buildings and soil be in another, and seeing it is an inheritance corporeal it shall pass by livery." This, of course, does not say that the chamber is "land," but merely that it is property of such a character as may be the subject of inheritance and may be conveyed by the same method as land.

The passage from Preston is however more explicit on page 8. He says: "Land comprehends all external subjects which are the objects of sensation, and admit of manual occupation *and are in their nature permanent and immoveable*; in short, *are part of the terrestrial globe*. Thus a house, a garden, an orchard, a field, etc., is land. Of an upper chamber a feoffment may be made; of course, it is a corporeal hereditament, in other words, land."

The last sentence taken by itself is certainly an explicit statement that an upper chamber is “land,” but ought it not in reason to be read with what has gone before—must we not infer that the real meaning of the author is that the upper chamber by reason of its immoveable connection with the soil over which it rests, has become a part of that land, not that per se, and apart altogether from its connection with the soil, it is land. The learned author certainly never meant to suggest that a chamber suspended from a balloon is “land.” Reading the whole passage together, the only reasonable inference appears to be, not that an upper chamber is per se land, but that its connection with the soil makes it in contemplation of law a part of that particular piece of land over which it is erected.

If this be the true meaning of the passages from Preston and Coke it is obvious that the majority of the judges of the Supreme Court have misinterpreted them. For certain purposes no doubt a building in the eye of the law becomes identified with the land on which it rests, so as to become in contemplation of law a part of that land, but the building is not for all that “land”; the “land” on which it rests may belong to one person, and the building to some one else and the owner of the building in that case may not have any interest whatever in the “land.” A building may be made of timber and be moveable, whereas it is of the essential character of “land” that it is immoveable. If a building by being placed on land thereby becomes “land,” what “land” is it? Is it the piece of land on which it rests? If so is that piece of land transferred to the other side of the street when you remove the building there? We think we have said enough to shew that a building is not “land.” Indeed, it is a self-evident proposition. But assuming it is land we ask again what land is it? Is it, as Mr. Justice Duff seems to suggest, a strata superimposed on the natural soil so that each floor and room is to be regarded as a separate and distinct strata of “land,” which is not land, as anybody can see, but a species of legal “land” which has no actual existence, except in the brain of lawyers, and in fact mere land “in the air.”

With all due respect to those who hold the contrary opinion, we venture to believe that the Real Property Limitations Act is intended to apply to real "land" and not to merely imaginary or theoretical "land." It is quite true that the definition of "land" in that statute is wide enough to include, "unless a contrary intention appears," messuages and all other hereditaments whether corporeal or incorporeal and money to be laid out in the purchase of land (and chattels and other personal property transmissible to heirs), and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, title, and interests, or any of them, are in possession, reversion, remainder or contingency, R.S.O., c. 133, s. 2. A room in a house may, according to the authorities above referred to, be the subject of a corporeal hereditament, and as such within the terms of the statute, but the statute requires in effect an exclusive possession by a squatter before he can acquire a title under its provisions, and the dilemma which Mr. Justice Garrow put, we do not think is at all answered by the Supreme Court. In order to establish his title under the statute the squatter must shew an exclusive and undisputed possession of the land or of the corporeal hereditament he claims, which in the case in hand was not shewn, but merely a possession jointly with the true owner, which would not be sufficient under the statute to oust the latter's title.

Not only have the Supreme Court declared a room to be "land," but this species of "land" being of such an aerial character that it needs support, they have also declared that the possession of a room draws with it a right to have the substructure, to which no title has been acquired, maintained in statu quo, so far as necessary for the support of the room.

Whether the judgment of Mabee, J., was modified in this respect is not very clear. Duff, J., seems to have disagreed with Davies, J., as to the nature of the plaintiff's right to support,

but Duff, J., with whom the Chief Justice concurred says that "the plaintiff is not entitled to prevent the defendants demolishing their part of the building merely because some part to which he has acquired a possessory title would thereby lose the support which it now receives . . . he is, I think, entitled to an order restraining the defendants from interfering with so much of the structure as rests upon that part of the soil itself to which he had acquired a possessory title." This passage is somewhat difficult to understand, because the plaintiff, according to the judgment of the court, had acquired no possessory title to any part of the soil itself, but merely to a room overhanging the soil, and besides the learned judge seems inconsistent with himself as with one breath he declares the plaintiff is not entitled to something which he in the next breath proceeds to give him.

The Statute of Limitations by this method of construction is made to confer on squatters rights which rightful owners could not acquire. Broadly stated the proposition of law laid down by the Supreme Court is this, a squatter by ten years' possession acquires not only a possessory title to the land he occupies, but also as against the true owner all easements necessary for its enjoyment. For instance, if in the present case the owners of the land also owned a vacant lot over which light came to the room in question, according to this case they might be restrained from building on that lot as it would interfere with the enjoyment of the room! Support is an easement just as much as light, and both are equally necessary to the enjoyment of the room—and yet under the statute 20 years would be necessary to give a rightful owner an easement of support from adjacent land, and an easement of light is not now acquirable by any length of enjoyment. We may remark that the land beneath the plaintiff's room was quoad the plaintiff's "land in the air" adjacent land. Why the statute should be construed in this elastic way in favour of squatters is not very apparent, unless it be that they are regarded by the Supreme Court as a meritorious class which deserves to be encouraged by the courts of law.

THE BOARD OF RAILWAY COMMISSIONERS.

The Board of Railway Commissioners for Canada has been increased to six members under the authority of c. 62 of the statutes of 1908. The *Canada Gazette* of September 19th announces that His Excellency, the Governor-General, has been pleased to make the following appointments: James Pitt Mabee, James Mills, M. E. Bernier, D'Arcy Scott, Thomas Greenway and S. J. McLean, to be members of the Board; J. P. Mabee to be Chief Commissioner and D'Arcy Scott to be Assistant Chief Commissioner thereof.

The three first named were already members of the Board, and we need not refer to them further now. The new Assistant Chief Commissioner is a son of the Secretary of State, who has resigned from the Cabinet. Mr. Scott has been, for some years, the Ottawa solicitor of one of the large railway companies, and, during the past two years, has occupied the important position of Mayor of Ottawa. As such he has had to do with questions between the municipality and the railways. He is known to be fair and practical, and, in time, will, no doubt, become a valuable member of the Board. Without, however, in any way reflecting on his capabilities, it might have been desirable that a lawyer of riper years and maturer judgment should have been chosen as Assistant Commissioner. Mr. Scott might very properly and reasonably have served, for a time at least, as an ordinary member of the Commission, rather than, as he usually will be, the acting Chief Justice of one division of this Railway Court, which is now enabled to sit in two divisions simultaneously.

Mr. Greenway has had large experience in public life, but was, undoubtedly, put on the Board to represent the West and its farming interests. If it is necessary that the farmers should be represented, Mr. Greenway will, no doubt, fulfil the expectations of his friends. The appointment of Prof. S. J. McLean will also be acceptable, for though rather a theorist than having had an experimental training, his intimate knowledge of the

working of railroad transportation from an academic point of view will find its usefulness on the Board. As to these qualifications, he has no superior in the Dominion. At the time of his appointment, Mr. McLean was Associate Professor of Political Science in the University of Toronto.

We deem it to be regretted that there are but two lawyers on the Board. It must not be lost sight of that this Board is a court, and an important one. There are not only questions of common sense to be settled, but most important points of law and as to the admission of evidence. Such being the case it does not seem reasonable to throw too much of the work on the one legal member of the Board whose "opinion upon a question of law shall prevail." The work of the Board is much in the limelight, and the wisdom or otherwise of the new appointments will soon be known.

A RURAL CONSTABULARY.

No one conversant with the conditions which prevail in the rural parts of Ontario, as regards the protection of life and property, can fail to realize the necessity for some better system of police than that now existing. It would be more accurate to say the necessity for creating a system were none now exists, for our rural constabulary can no longer be relied upon as in any degree competent for the duty they are called upon to discharge. Speaking of the rural parts of Ontario we include the villages and small towns not large enough to maintain an effective force of their own, and what applies to Ontario will apply more or less to the other Eastern provinces. There was a time in the history of this country when no householder ever thought of locking his doors at night—when tramps were unknown—when theft of any kind was of rare occurrence—and when, though drinking was more common, and more cases of fighting and of assault came before the magistrates, there was not that spirit of rowdiness now so frequently complained of.

This state of things exists no longer. Greater population,

greater wealth, with all the advantages which advancing civilization brings with it, bring also in their train many evils unknown before. We have not many professional tramps, but there are numbers of men traversing the country in all directions, ostensibly looking for work, but often failing to find it, begging their way from one farm house to another, sleeping in barns and hay-lofts, and causing apprehension not altogether groundless. Cases of robbery and of criminal assault have become frequent, while convictions are rare from the fact that there is no one at hand to pursue or detect the criminal. Minor cases of theft for a similar reason are not dealt with, and many offences of various kinds go unpunished.

From this state of things one very serious result follows. There is among the young people a growing disregard for laws which they do not see enforced, and contempt for authority which cannot make itself respected, and of which no symbol appears. Rowdiness, with all its evil effects, becomes rampant even in little country places where such conduct would never be suspected. It is mere hypocrisy to deny this, or to claim for our rural population a degree of virtue which they do not possess, or to charge the evil upon foreign influences which have never been felt. Want of home influence and of religious training are as potent in country districts as in towns and cities to produce their natural results, but to see offences committed and no punishment to follow is a cause of demoralization most powerful in the country.

We are glad to see that this subject has been taken up by the Press, and still more so to know that it is under consideration by the Provincial Government. Admitting the need for the establishment of an effective rural police we have many examples for our guidance. The Irish constabulary, perhaps the finest police force in the world, has too much of a military character to be altogether suited to us, and the same objection may apply, though in a less degree, to our own North-West police, an equally efficient body of men. Then there is the English system of county constabulary, a rural force much such as we require. The difficulty of establishing a county constabulary would not only

be the expense, but the finding of an authority from which the personal and political element could be altogether excluded, for excluded it must be if any good is to be effected.

As most economical, and likely to be most effective, and most free from dangerous influences, a Provincial Board, properly paid and permanently appointed, would be the best. The chief difficulty would be the selection, and that point must be carefully considered. This Board should be free and untrammelled in the work of organization and administration, and, by proceeding carefully and tentatively, guided also by the example of similarly constituted bodies, should be able to establish a provincial police at once creditable and useful, a force which would be a terror to evil doers, and maintain the power and dignity of the law in the remotest corners of the province.

Such a body could also enforce many laws and regulations now very much neglected, such as returns of births and deaths, and statistics of various kinds, sanitary regulations, etc.

As has been suggested the use of the telephone now so generally established throughout the country would render such a force almost ubiquitous, and the escape of criminals almost impossible. It would of course be largely composed of mounted men, and the occasional sight of a uniformed policeman appearing when least expected, and known to be far removed from any local influence, would have a very salutary effect, and be reassuring to timid wayfarers and uneasy householders.

Force has been given to the views above expressed by the recent riots on the trains carrying harvest hands to the North-West, which are a glaring example of the spirit of lawlessness prevailing in some of our country districts.

LAWYERS' FEES.

We are glad to see this subject taken up in a very sensible way in perhaps the best of our Canadian newspapers. It is not much use for a legal journal to explain matters of this kind, as such explanations do not reach those who need enlightenment, but comments which appear, for example, in such a widely cir-

culated newspaper as the *Montreal Star* are educational in the right direction. We reproduce part of the article. Its perusal by the learned divine, whose utterance was the text for it, will explain to him several things, which, if he had known, he probably would not have made the foolish observations he did (see ante, p. 563). The remarks which we quote in reference to litigants not knowing what amount of expense they are incurring are a forcible argument for what we hold to be advisable, namely: a lump sum for litigation; or, what is otherwise known as a block system of charges. This would seem to be the most practicable solution of the difficulty. The learned preacher is reported to have said—inter alia:—

“The question of exorbitant legal fees and astonishing medical charges is one that has puzzled many a good man. Yet what is there to do about it? We do not blame a farmer for getting all he can for his wheat, or a merchant for charging specially high prices for some rare article which he happens to possess. So if a lawyer can get these staggering prices for his services why should he fail to reach out his hand? The world is pretty generally run on that principle. We will usually find, if we will enquire, that these large fees are paid either by very wealthy corporations or individuals who have interests of immense value at stake. They can afford to pay the fee to reduce any risk they may run of losing the case. The only way to prevent this would be to prevent the occurrence of such cases. It is hardly fair to ask the lawyers to work for low fees when they can get high ones. The legal fee which stirs a sense of injustice is that which surprises the man asked to pay it. Where a big corporation employs a lawyer with the expectation of paying a large fee, and pays it, it is hard to see on what grounds any one can base a complaint. But when the simple citizen goes to law, or is dragged into law, and employs a lawyer expecting to pay a moderate fee, but is confronted with a staggering bill which altogether exceeds his anticipations, then sympathy is aroused. There ought to be some means by which a prospective litigant could find out in advance about what his plunge into litigation is likely to cost

him. We could not expect the lawyers to foresee all the smaller charges and come down to a few odd dollars in their estimates; but they ought to be able and willing to give rough estimates which would generally stand. One trouble is that many a man goes to law without counting the cost, just as he summons a physician and does not ask what he is going to be charged until the bill comes in. In the latter case especially, there is a delicacy about such a course. We trust to the honour of our physicians touching their financial dealings just as we do in their treatment of the sick. But there is no particular reason why we should be so squeamish in mentioning money to a lawyer. And a little plain talking before a case began might obviate a good deal of grumbling and perhaps litigation afterward. It might even obviate the case itself."

The learning on the subject of covenants running with land is not free from difficulty, and a lawyer need not be ashamed to take time to consider, when asked to advise thereon. Not so abstruse, however, was it in the opinion of a government agent seeking signatures to a document granting to a certain public utility in the Province of Ontario a right of way or easement of some sort. A farmer who was approached by the agent (a rag and bottle man, by the way, and who therefore knew a thing or two) was a little suspicious that in this public utility might lurk danger to his property and perhaps to life and limb, and so he said he would not sign unless full protection were secured to him and his against all accidents. The agent was equal to the occasion, for he held up the document and triumphantly called the farmer's attention to the concluding proviso, which, he said, was inserted for that very purpose. This safeguard reads as follows: "The burden and benefit of this agreement is intended, as far as may be, to run with the said lands." This, of course, was conclusive and the farmer signed.

TELEPHONIC COMMUNICATIONS AS EVIDENCE.

As science and civilization advances the law attempts to follow, if not as promptly as it would, at least not a great way off. The case of *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 69 Atl. Rep. 405, discusses the admissibility and effect of telephonic communications as evidence.

In that case the evidence of Mr. Wilbourn, superintendent of the Gardiner Company, in reference to a telephone conversation with the Knickerbocker Company, was admitted, subject to exception. He called up the company and inquired who was there, and the party at the phone said the Knickerbocker Ice Company. He did not recognize the voice of the person talking. The man at the phone stated the price of the ice, said they had plenty of it, and would let the plaintiff have it provided it gave them all its trade. The plaintiff got five or six loads that day (June 29th), and all the orders were by telephone. He had his talks with the same person, and in each case he got all the ice he ordered. One of defendant's exceptions was to the refusal to strike out that evidence.

The trial court admitted the evidence and the appellate court after reviewing the authorities upheld the action of the trial court, saying: "As it is a character of evidence that might be used improperly, courts should be careful in the application of the rule. "The authorities amply sustain the decision in this case. In *Murphy v. Jack*, 142 N.Y. 215, 36 N.E. Rep. 882, 40 Am. St. Rep. 590, which was an application to vacate an attachment which had been issued on an affidavit made on information over the telephone, the court said: 'There would be no objection to the information having been conveyed through the medium of the telephone, if it had been made to appear that the affiant was acquainted with the plaintiff and recognized his voice, or if it had appeared, in some satisfactory way, that he knew it was the plaintiff who was speaking with him.' In *Wolfe v. Mo. Pac. R. Co.*, 97 Mo. 473, 11 S.W. Rep. 49, 3 L.R.A. 539, 10 Am. St. Rep. 331, it was held that a conversation by telephone be-

tween a witness and another person in the private office of a party is not inadmissible because the witness does not identify the voice of the other person as that of the party or his clerk. Barclay, J., said: 'When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication in relation to his business through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business therein carried on.' See also, *Mo. Pac. Ry. Co. v. Heidenheimer*, 82 Tex. 201, 17 S.W. Rep. 608, 27 Am. St. Rep. 861; *Gen. Hospital Soc. v. N. H. Rendering Co.*, 79 Conn. 581, 65 Atl. Rep. 1065; *Kan. City Star Co. v. Standard Warehouse Co.*, 123 Mo. App. 13, 99 S.W. Rep. 765; *Godair v. Ham. Nat. Bank*, 225 Ill. 572, 80 N.E. Rep. 407, 116 Am. St. Rep. 172; Jones on Ev., s. 210; Wigmore on Ev. s. 2155. The latter says: 'No one has ever contended that, if the person first calling up is the very one to be identified, his mere purporting to be A. is sufficient, any more than the mere purporting signature of A. to a letter would be sufficient. Ante, s. 2148. The only case practically presented therefore is that of B.'s calling up A. and being answered by a person purporting to be A. There is much to be said for the circumstantial trustworthiness of mercantile custom (ante, s. 95) by which, in average experience, the numbers in the telephone directory do correspond to the stated names and addresses, and the operators do call up the correct number, and the person called does in fact answer. These circumstances suffice for some reliance in mercantile affairs, and it would seem safe enough to treat them in law as at least sufficient evidence to go to the jury, just as testimony based on prices current is received. Ante, s. 719. This view has received some judicial support.' The author then goes on to consider the case where the antiphonal speaker does not purport to be a particular person, but merely some member of the office staff authorized to make a contract or an admission, and added: 'On the principle above suggested (though not with the same force)

mercantile experience may well suffice, by which customarily the person who is in fact summoned to the telephone and proceeds to conduct the negotiation is *prima facie* a person authorized to do so, precisely as a person receiving money at the cashier's desk is presumably authorized to do so. Upon this point there is little judicial inclination to take the liberal view.' ''—*Central Law Journal*.

The International Law Association, which last year met in this country, held its session on September 22nd and the days following, at Budapest, Hungary, on the invitation of the Budapest Bar Association, the Association of Hungarian Jurists, and the Budapest Lawyers' Club. The programme includes the following subjects, on which papers have been promised: International Arbitration; Double Taxation; Unification of the Law of Bills of Exchange; Cases of International Private Law in Egyptian Mixed Tribunals; Jurisdiction in Divorce; International Regulation of Road Traffic; Enforcement of Arbitral Decrees and Judgments Abroad; Authentication of Foreign Law in Court Proceedings; Comparison of English and Continental Procedure; The Conditions of Service and Legal Position of Seamen; International Aspects of Workmen's Compensation; Extradition Treaties; The Sale of Goods in its International Bearings; Territorial Waters.

REVIEW OF CURRENT ENGLISH CASES.

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WILL—CONSTRUCTION—CONTINGENT—REMAINDER OR EXECUTORY DEVISE.

White v. Summers (1908) 2 Ch. 256 shews that the question whether a devise is to be construed as contingent remainder or as an executory devise is one of strict law and is unaffected by the intention of the testator, unless his words can be construed as making alternative gifts, one as a contingent remainder and the other by way of executory devise. In this case in 1847, the testator devised real estate to one Bowen for life and after his death to his sons successively in tail male, in default of such issue to the eldest or other son of Jas. Summers, who should first attain or have attained 21, successively in tail male, and in default of such issue to Frances, the daughter of Jas. Summers for life and on her death to her sons successively in tail male. Bowen died in 1859, and at that date no son of Jas. Summers had attained 21. Jas. Summers, however, entered into possession as guardian of his infant son, who entered into possession on his attaining 21, and who was, on his death in 1879, succeeded by his son who was in possession at the commencement of the action. Frances Summers lived until March 1, 1906, and on her death her son brought the present action claiming the estate, on the ground that the gift to Jas. Summers' son was a gift in contingent remainder, and he, not having attained 21 in the lifetime of Bowen, the remainder never took effect. Parker, J., held that this contention was valid and gave judgment for the plaintiff.

TRADE MARK—INVENTED WORD.

In *Phillippart v. Whiteley* (1908) 2 Ch. 274, Parker, J., held that the word "Diabolo" as applied to a top spun by means of two sticks and a cord, is not an invented word, but a mere variant from the Italian word Diavolo, meaning the devil, and is therefore not registrable as a trade mark.

ADMINISTRATION—REAL ASSETS—DEVISE IN TRUST—ALIENATION BY DEVISEE—PURCHASER FOR VALUE WITHOUT NOTICE FROM DEVISEE—BONA FIDE ALIENATION—PRIORITY OVER CREDITOR OF TESTATOR—DEBTS RECOVERY ACT, 1830 (11 GEO. IV. & 1 W. IV. c. 47) ss. 6, 8 (2 EDW. VII. c. 1, s. 4, ONT.).

In re Atkinson, Proctor v. Atkinson (1908) 2 Ch. 307. Under the English Debts Recovery Act, 1830 (11 Geo. IV. & 1 W. IV. c. 47) a somewhat similar provision is to be found as that in (2 Edw. VII. c. 1, s. 4) which, while making lands devised assets in the hands of a devisee for payment of the devisors' debts, nevertheless protects bona fide purchasers from the devisee without notice of the debts. In this case the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Kennedy, L.J.J.), decide, overruling Joyce, J., that the protection of the statutes extends to equitable as well as legal estates.

ADMINISTRATION—REAL ESTATE—SUCCESSION DUTY—EQUITABLE CHARGE—EXONERATION—LOCKE KING'S ACT, 1854 (17-18 VICT. c. 113), AND 1877 (40-41 VICT. c. 34)—(R.S.O. c. 128, s. 37).

In re Bowerman, Porter v. Bowerman (1908) 2 Ch. 340. In this case a person entitled to real estate died intestate in 1904, his estate being subject to succession duty, which by statute is made a charge on the land. The land descended to one Bowerman who also died intestate in 1907 without having paid the duty, his heir at law claimed to have the estate exonerated from payment of the duty by the personal estate, but Joyce, J., held that Locke King's Act applied (see R.S.O. c. 128, s. 37) and that the heir took cum onere.

MARRIAGE—DIVORCE—FOREIGN JURISDICTION—PUTATIVE MARRIAGE—LEGITIMACY OF ISSUE OF INVALID MARRIAGE—LAW OF SCOTLAND—IGNORANCE OF FACT—ERROR IN LAW.

In re Stirling, Stirling v. Stirling (1908) 1 Ch. 344 is an illustration of the difficulties people are apt to get into when they embark on divorce proceedings. The facts of the case were that Mr. and Mrs. Smith were married in Canada in 1883. Mr. Smith was Scotch, but he appears to have acquired a Canadian domicile. Mrs. Smith committed adultery with one Stirling and in 1895 left Smith and went to live with Stirling. Mr. Smith left Canada for the purpose

of getting a divorce in North Dakota and he took up his residence in that State for ninety days, and at the end of that time presented a petition for divorce alleging as the grounds that Mrs. Smith in her husband's absence had associated and become intimate with Stirling so as to cause gossip, that she thought more of Stirling than the plaintiff, that she was now travelling with Stirling in California, and that she neglected her husband and children. Mrs. Smith on the same day appeared by attorney and consented to an immediate hearing and made no objection. The pretended divorce was therefore granted on the same day and twelve days afterwards the formal judgment was drawn up and entered. Eight months afterwards Mrs. Smith went through the form of marriage with Stirling who had since died leaving as issue of the marriage one child the defendant who as heir at law in tail of his father claimed to be entitled to a certain trust fund in England. The plaintiff was the person next entitled, and contended that the defendant was illegitimate. This depended on the validity of the North Dakota divorce. But the defendant contended that even if it were invalid, yet under Scotch law where there has been a bona fide belief on the part of the parents that they were lawfully married, the issue is legitimate even though the marriage be in fact invalid. Eady, J., held, indeed it was not contested by counsel, that the Dakota divorce was invalid in Scotland and Canada, first for want of jurisdiction on the part of the foreign court, the plaintiff not having been truly domiciled within its jurisdiction; and also as having been granted on grounds not recognized by the law of either Scotland or Canada, and without deciding whether the doctrine of putative marriage was part of the law of Scotland, he held that if it were, it is confined to cases where the spouses have bona fide made a mistake of fact, and here he found the mistake, if any, was a mistake of law, viz., that the Dakota divorce would be valid in Scotland.

WILL—CHARGE OF DEBTS AND LEGACIES—BENEFICIAL DEVISE TO EXECUTOR—IMPLIED POWER TO SELL OR MORTGAGE—MORTGAGE BY DEVISE TO RAISE LEGACIES—LIABILITY OF MORTGAGEE TO SEE TO APPLICATION OF MONEY.

In re Henson, Chester v. Henson (1908) 2 Ch. 356. In this case a testator by will dated in 1879, charged his real estate with payment of debts and legacies and subject to such charge devised the land beneficially to one of his executors. The devisee

executed several mortgages the proceeds of some of which he applied in payment of legacies, but the moneys raised on one of the mortgages were not so applied, and a contest arose whether the legatee or the mortgagee was entitled to priority. Eady, J., held in favour of the mortgagee, on the ground that the devisee had an implied power under the will to sell or mortgage for the payment of debts and legacies, and that the charge being of both debts and legacies, the mortgagee was not bound to see to the application of the mortgage money, and he also held that it is not necessary for the protection of the mortgagee that the executor devisee should expressly purport to execute the mortgage in his capacity of executor.

WILL—DIRECTION TO PAY “DEBTS”—COLONIAL SUCCESSION DUTY—“DEEMED TO BE A DEBT.”

In re Brewster, Butler v. Southam (1908) 2 Ch. 365. In this case, a testatrix domiciled in England made an English will appointing English executors and trustees and colonial executors and trustees. She directed the colonial trustees to sell land in Melbourne and remit the proceeds to the English trustees to be held on certain specific trusts. She devised the residue of her real and personal estate to her English trustees upon trust to sell, and thereout inter alia pay her “debts,” and to stand possessed of residue on certain trusts. The land in Melbourne was subject to succession duty which by the colonial statute was to be “deemed to be a debt of the testatrix,” and the question Eady, J., was called on to decide was whether this duty was payable as a “debt” out of the residuary estate, and he held that it was not, and fell properly on the Melbourne property in respect of which it was payable.

COMMISSION—PAYABLE “AS LONG AS WE DO BUSINESS”—DEATH OF CONTRACTEE—CONTINUATION OF BUSINESS.

In *Wilson v. Harper* (1908) 2 Ch. 370, one Joseph Wrae, a commercial traveller, made an agreement with the defendants whereby it was agreed that in consideration of Wrae introducing to the defendants, customers, the defendants were to allow Wrae 5 per cent. on all accounts he introduced, so long as the defendants did business with them. Wrae had died and the plaintiffs were his personal representatives, and claimed to recover the above commission on accounts of customers introduced

by Wrae, and who continued, after his death, to be customers of the defendants. The defendants contended that the death of Wrae had put an end to the contract, but Neville, J., held that by the terms of the agreement, the commission was payable as long as the defendants continued to do business with customers introduced by Wrae, and that, therefore, it continued to be payable, even after his death. Judgment was therefore given in favour of the plaintiffs.

VENDOR AND PURCHASER—RESTRICTIVE COVENANTS—RIGHTS OF PURCHASERS INTER SE—UNEXECUTED ENGROSSMENT—RELEASE BY ACCEPTING LESS ONEROUS RESTRICTIONS—INJUNCTION.

Elliston v. Reacher (1908) 2 Ch. 374. This was an action for an injunction to restrain a breach of a restrictive covenant not to erect a hotel on defendants' land. The plaintiffs were one Elliston, the owner of lot 27, and other parties, who were owners of lots 30 and 31. The plaintiffs' lands had originally formed part of the same estate, and the owners had laid it out as a building estate, and the several lots had been sold subject to the covenants contained in an "indenture" dated January 16, 1861. At the trial an engrossment of an unexecuted deed of that date was produced, which, the judge found as a fact, was the document referred to as an "indenture," and which contained restrictive covenants inter alia against building a hotel. The defendants' land had been conveyed by the common owner subject to the same covenants, but while the predecessors of title of the plaintiffs, who owned lots 30 and 31 owned those lots they joined in a conveyance to the defendants of their lot, and this conveyance was not made subject to the restrictive covenants now sought to be enforced. This objection did not apply, however, to Elliston. Parker, J., who tried the action, held that the defendant, having purchased with notice of the restrictive covenants to which the estate was subject, was bound thereby as against Elliston, but the other plaintiffs had lost their right to enforce them by reason of their predecessors in title having conveyed to the defendant subject only to covenants of a less onerous character. He, therefore, granted an injunction in favour of Elliston, but dismissed the action as far as the other plaintiffs were concerned.

NEGLIGENCE—NEGLIGENT MODE OF CONDUCTING BUSINESS—DANGEROUS PRACTICE—EVIDENCE—SINGLE ACT OR OMISSION—EVIDENCE OF SIMILAR ACTS OR OMISSIONS—INFECTING CUSTOMER WITH BARBER'S ITCH.

Hales v. Kerr (1908) 2 K.B. 601 was an action brought by a customer of the defendant, a barber, for infecting him with barber's itch. The plaintiff gave evidence shewing that he had been a customer of the defendant who, while shaving him, had cut him slightly with a razor and then rubbed the cut with a towel and applied a powder puff; that very soon afterwards the cut became inflamed and barber's itch developed. The plaintiff negatived being at any other barber's, and also gave evidence to shew that two other persons who were customers of the defendant had been similarly affected after being shaved at his shop. The evidence of these two witnesses was objected to by defendant, but admitted as bearing on the allegation that the defendant was guilty of negligence in not keeping his razors and other appliances clean. Judgment was given in the County Court for the plaintiff, which was affirmed by the Divisional Court (Channell and Sutton, JJ.). The appeal was on the ground of the admissibility of the evidence objected to, but the Divisional Court held that for the purpose of supporting an allegation as to the defendant's mode of carrying on his business, the evidence had been properly admitted.

SHIP—BILL OF LADING—CONDITION LIMITING LIABILITY—LOSS DUE TO NEGLIGENCE.

Baxter's Leather Co. v. Royal Mail SS. Co. (1908) 2 K.B. 626, it may perhaps be remembered, was an action brought on a bill of lading which limited the liability of the shipowners for loss of goods of any description "beyond the amount of £2 per cubic foot for any one package," unless shipped under a special declaration of value and extra freight paid. Goods which had been shipped without any declaration of value and without payment of any extra freight were lost through the shipowners' negligence, *Bingham, J.* (1908) 1 K.B. 796 (noted ante, p. 349), held the defendants were not liable for the goods lost, beyond the specified amount, notwithstanding the loss arose through their negligence, and his decision has been now affirmed by the Court of Appeal (*Barnes, P.P.D., and Farwell and Kennedy, L.JJ.*).

CRIMINAL LAW—EVIDENCE OF ACCOMPLICE—ABSENCE OF CORROBORATION—OMISSION OF JUDGE TO CAUTION JURY.

In *King v. Tait* (1908) 2 K.B. 680, the new Court of Criminal Appeal (Lord Alverstone, C.J., and Ridley and Darling, JJ.), quashed the conviction because the judge at the trial had omitted to caution the jury that they should not convict on the uncorroborated evidence of an accomplice.

SHIP—CHARTER PARTY—EXCEPTIONS—CONSTRUCTION—"EJUSDEM GENERIS."

In *Larsen v. Sylvester* (1908) A.C. 295, the House of Lords (Lord Loreburn, L.C., and Lords Ashbourne, Hereford, Robertson and Collins) have held, affirming the judgments of the courts below, that in the construction of the charter party in question in this action, the "ejusdem generis" rule of construction was not properly applicable. The charter party excepted both parties from all liability arising from "frosts, strikes . . . and any other unavoidable accidents or hindrances of what kind soever beyond their control delaying the loading of the cargo." Delay was caused by the block of other ships at the loading port, and their Lordships held this was within the exception. They, however, expressly guard themselves against being understood as in anyway impeaching the correctness of the "ejusdem generis" rule of construction.

HIGHWAY—MINE UNDER HIGHWAY—SUBSIDENCE OF HIGHWAY CAUSED BY MINE OWNER—REPAIR OF HIGHWAY—MEASURE OF DAMAGES.

Lodge Holes Colliery v. Wednesbury (1908) A.C. 323 is the case known in the courts below as *Wednesbury v. The Lodge Holes Colliery* (1907) 1 K.B. 78 (noted ante, vol. 43, p. 162). The action was by a municipal body against mine owners for having caused a subsidence in a highway vested in the plaintiffs. The plaintiffs, in repairing the road, had restored it to its former level. The defendants contended that the repairs were excessive, and that they were merely liable for what it would have cost to make the road reasonably commodious for the public. The Court of Appeal overruling Jelf, J., held, that the defendants were liable for the full amount of damages claimed, but the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten and Atkinson) consider that Jelf, J., was right, and

have restored his judgment, holding that the plaintiffs could only recover what it would have cost to restore the road so as to make it equally commodious as it was before the subsidence, and that this might have been done without restoring the road to its original level.

JUSTICES—QUARTER SESSIONS—JURISDICTION OF HIGH COURT—
STATED CASE—DECISION OF JUSTICES FINAL.

In *Kydd v. Watch Committee of Liverpool* (1908) A.C. 327 the House of Lords have overruled the decision of the Court of Appeal (1907) 2 K.B. 591 (noted ante, vol. 43, p. 698). By a statute it was provided that in certain cases the party aggrieved might appeal from the decision of the Police Board to the Court of Quarter Sessions, whose decision should be final. The Court of Appeal overruling a Divisional Court held, that where a Court of Quarter Sessions gave its decision in the form of a stated case, the High Court had jurisdiction to entertain the case, but their Lordships held that this view was erroneous, notwithstanding they had themselves entertained jurisdiction in a similar case where, however, the objection had not been raised.

INSURANCE—WARRANTY OF FREEDOM FROM CAPTURE—CAPTURE
OF SHIP—CONDEMNATION—TITLE OF CAPTORS.

In *Andersen v. Martin* (1908) A.C. 334 the House of Lords have affirmed the decision of the Court of Appeal (1907) 2 K.B. 248 (noted ante, vol. 43, p. 620). The action was on a policy of marine insurance which excepted the insurers from liability in case of loss by capture. The vessel was captured by a belligerent, but before condemnation it became a total wreck, but the vessel was subsequently condemned as a prize by a prize court. The court below held that the title of the captors related back to the date of capture, and the plaintiff could not recover for the loss by subsequent wreck, and their Lordships agree with that conclusion.

TRUST—GIFT OF INCOME ACCORDING TO TRUSTEES' DISCRETION—
ASSIGNEE OF LEGATEE.

Train v. Clapperton (1908) A.C. 342 was an appeal from the Scotch Court of Session. A testator had bequeathed a fund of £5,000 to trustees upon trust to pay to his brother during his lifetime "either the whole or only a portion of the annual

revenue thereof, and that subject to such conditions and restrictions, all as my trustees in their sole and absolute discretion think fit." The trustees had become involved in litigation as to the testator's estate, and during five years, had only paid the brother £24 5s. The brother assigned his interest to the plaintiff, who claimed to be paid the whole of the income of the £5,000, but the House of Lords agreed with the court below, that the plaintiff had no higher rights than his assignor, and that he had no right to the total income, its disposal being left to the absolute discretion of the trustees.

NEGLIGENCE—RAILWAY COMPANY—FAILURE TO CLOSE DOOR OF CARRIAGE.

Toal v. North British Ry. (1908) A.C. 352 was an action to recover damages against a railway company for alleged negligence. The plaintiff was standing on the railway platform, where he had alighted from a train, and had been struck and injured by the door of one of the compartments of a car which had been left open, when the train again started. The defendant set up that the plaintiff was injured through his own negligence in not leaving the platform immediately after he alighted, and the Scotch Court of Session thought this contention well founded and refused the plaintiff a jury trial, but the House of Lords (Lord Loreburn, L.C., and Lords Halsbury, Ashbourne, Robertson and Collins) considered that the leaving the door open was some evidence of negligence on the part of the defendants which the plaintiff was entitled to have submitted to a jury.

INNKEEPER—LIMITATION OF LIABILITY—GOODS DEPOSITED WITH INNKEEPER "EXPRESSLY FOR SAFE KEEPING"—EVIDENCE—INNKEEPERS' LIABILITY ACT, 1863 (26-27 VICT. C. 41) S. 1—(R.S.O. C. 187, S. 3).

Whitehouse v. Pickett (1908) A.C. 357. This was an action against an innkeeper to recover damages for loss of goods placed in his keeping by the plaintiffs' traveller, a guest. The plaintiffs' traveller carried with him a bag of samples worth £1,800, which, on arrival at defendant's inn, he handed to the "boots" who took it without anything being said to the defendant's office and placed it in the same place it had been placed on previous occasions. Later in the day the traveller asked for the

bag and it was found to have been stolen. At the trial, judgment went for the plaintiff, but on appeal the Court of Session held, that as there was no proof of any deposit expressly for safe keeping, the Innkeepers' Liability Act, 1863 (26-27 Vict. c. 41) s. 1 (R.S.O. c. 187, s. 3) applied, and the innkeeper's liability was limited to the amount therein mentioned, to which the judgment was reduced, and with this conclusion the House of Lords (Lord Loreburn, L.C., and Lords Ashbourne and Robertson) agreed, but Lord Collins dissented. The majority being of opinion that in order to constitute an express deposit under the statute, it must be proved that something was said or done by the depositor to apprise the innkeeper of the fact that the deposit was being made with him for safe custody.

ADMINISTRATION BOND—DURATION OF SURETIES' LIABILITY—
COMPLETION OF ADMINISTRATION—LOSS OCCASIONED BY BENEFICIARIES RIGHTFULLY IN POSSESSION.

Blake v. Bayne (1908) A.C. 371 was an appeal from the High Court of Australia. The action was brought against the sureties named in a bond given for the due administration of a deceased intestate's estate. The appeal turned principally on the evidence, and the Judicial Committee of the Privy Council (Lord Loreburn, L.C., and Lords Macnaghten, Atkinson and Collins, and Sir A. Wilson) differed from the Court below as to its effect, and came to the conclusion that there had been no misconduct by the administratrix, and no loss of assets in the course of administration, that a deed of indemnity executed by the plaintiffs, and on which the defendants relied, had been executed with full knowledge of the facts, and was binding on the plaintiffs, and an effectual discharge of the alleged liability of the defendants, and, thirdly, that after the payment of the testator's debts, the plaintiffs and the administratrix, as next of kin of the deceased, were entitled to the residue in undivided shares, and so held and enjoyed it, and that the loss of the estate had taken place while it was rightfully in their possession, and, therefore, although the administratrix continued to act as the manager of the estate with the concurrence of the plaintiffs, yet the losses which had thereby resulted could not be attributed to her in her character of administratrix. The judgment of the Court below was, therefore, reversed.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Teetzel, J.]

[July 10.

FRASER v. PERE MARQUETTE R.W. Co.

Crops—Destruction by fire—Railway Act, s. 298—Liability of railway company—Marsh hay baled and piled at siding.

This was an action for damages for the destruction of hay which was baled and piled at the railway siding awaiting shipment. The plaintiff owned a quantity of marsh lands, from which he annually cut grass commonly called marsh hay. It is also called sea grass, and, besides being used for fodder, it is used for the manufacture of mattresses. A large quantity of it had been cut and baled and at time of destruction was piled by siding used by defendant in connection with the Wallaceburg Sugar Refinery, awaiting shipment.

Two questions arise for determination: (1) Is the material covered by the word "crops" in s. 298 of the Railway Act of Canada? (2) If it was a crop while in the field, would it lose that character when baled and delivered for shipment?

TEETZEL, J.:—"In the Standard dictionary the word crop is defined as 'plants or grains collectively that are cultivated for consumption; also the soil product of a particular kind, place or season; anything gathered and stored at a proper time and for future use.' The grass in question is perennial and besides the work of cutting and gathering, the only work bestowed upon the ground consists in burning off, every spring, the old growth of the former grass. If the material had been destroyed in the field whether before or after it had been cut it would be well within the above definition of the word crop. Mr. Stone, solicitor for the defendants, presented a very ingenious argument, that, conceding the above to be the correct view, when the material was removed from the farm and piled along defendants' tracks for shipment, it lost the character of 'crop' within the contemplation of s. 298, and became merchandise.

"I am unable to adopt this argument. The Legislature has not

made provision in respect of crops in any particular place or while on a farm only, but in respect of 'crops' generally, no matter where situate."

A. B. Carscallen, for plaintiff. *F. Stone*, for defendants.

Teetzel, J.]

[July 23.

EBY, BLAIN CO. v. MONTREAL PACKING CO.

Chose in action—Assignment of book debts to creditor—Notice not given to debtors—Cheque in payment of book debts received by debtor as agent of assignee—Transfer of cheque to another creditor—Property in cheques.

The Eby, Blain Company obtained from the plaintiff Atkinson an assignment of present and future book accounts as security for past indebtedness and for further advances. No notice of this assignment was given to the parties owing the book accounts. Atkinson was permitted to collect the accounts and to use the proceeds in paying general expenses and liabilities up to about July 26, 1907, when this privilege was withdrawn and he was constituted agent for the Eby, Blain Co. to make collections solely for their benefit. The defendants were also creditors of Atkinson and on the 29th of August they were notified of the assignment to the Eby, Blain Co. On September 27th an agent of the defendants called at Atkinson's store and prevailed upon the bookkeeper to deliver to him on account of defendants' claim \$107.61 in cash and cheques of persons owing book accounts amounting to \$633.01.

Held, that under the circumstances of this case the absence of such notice did not affect the plaintiff's rights. As between Atkinson and the Eby, Blain Co., the former by the assignment divested himself of all property in the book accounts and after his appointment as agent to collect and transmit the proceeds, any other disposition of them would have been wrongful. When the cheques were delivered to the defendants they had actual notice of the assignment of the accounts represented by the cheques, and the fact that, as between the Eby, Blain Co. and the debtors the former could not have maintained in their own name an action by reason of notice of the assignment having been given under s. 58, s.-s. 5, of the Judicature Act cannot be taken advantage of by the defendants after the debtors have paid the accounts to the assignees' agent. Without the notice the

plaintiffs were equitable owners of the book accounts, and, after payment to their agent, their title was complete as against the debtors who paid Atkinson and the defendants who had notice of the equitable interest.

As to the \$107.61, cash, there was no evidence at the trial to shew how much, if any part, represented collection on book accounts and this part of the claim was not allowed.

R. McKay, for plaintiffs. *Ludwig*, for defendants.

Anglin, J.]

[Sept. 10.

IN RE BY-LAW NO. 204 OF THE TOWN OF GALT.

SCOTT v. PATTERSON.

Hydro-Electric Commission Act—Contract—Illegality—Not in accordance with by-law authorising it—Refusal of mayor to sign—Rights and liabilities of mayor as to.

The plaintiff, a ratepayer of the Town of Galt, applied on behalf of himself and all other ratepayers of that town, for an order in the nature of a mandamus commanding Thomas Patterson, as mayor of the town, to sign a contract between the Hydro-Electric Power Commission of Ontario and the town, for the transmission of electrical power to the town under a by-law passed Jan. 7, 1907, and approved by the ratepayers. The mayor objected to sign the contract on the ground that the contract did not conform in its terms to the provisions of the said by-law.

The Hydro-Electric Power Commission of Ontario was constituted by 6 Edw. VII. c. 15. Sec. 7 of that Act provides that the council of the municipal corporation may submit to the electors a by-law authorising it to enter into a contract for the supply of power, and in case such by-law receives the assent of the majority of the electors the contract may be entered into by the Commission and the municipal corporation.

Semble, although the statute does not in terms forbid municipal corporations to enter into contracts with the Hydro-Electric Power Commission for the supply of energy without first obtaining the approval of the electors such a prohibition is a necessary implication of the statute.

The by-law in question was for the supply of power at from \$17.37 to \$22 per horse power per annum ready for distribution

by the municipality. The proposed contract did not conform to the by-law in that it purported to bind the municipality to pay a fixed price for energy at Niagara and a proportionate share of the cost of transmission and other charges which were not determined.

Held, 1. That such contract would be illegal and a breach of faith with the electorate and contrary to the requirements of 6 Edw. VII. c. 15, and 7 Edw. VII. c. 10.

2. This being so the mayor was justified in refusing to sign the contract.

3. The mayor would have no right to refuse to sign because in his judgment the terms of the contract were not in the best interest of the municipality, nor upon any ground of policy, but where the legislature has empowered the municipality to enter into such contract only with the approval of the majority of the electors and this approval has not been obtained, he cannot be compelled to sign a contract which would commit the municipality to a liability which the legislature has not empowered him to make and which could only be entered into in violation of the conditions prescribed by the statute.

4. Whilst s. 333 of the Municipal Act directs that every by-law shall be signed by the head of the corporation and whilst this section has been held to be imperative and to impose upon the mayor a ministerial statutory duty enforceable by summary order of mandamus (see *Kennedy v. Boles*, 6 O.W.R. 837) he cannot be compelled to sign a contract where the refusal is based upon the ground that the by-law is beyond the jurisdiction of the council and that it purports to authorize and require the making of an invalid and illegal contract. The court will not assist in the doing of that which is unauthorized and illegal and which involves an act of bad faith. (See *State ex rel. Nicholson v. Mayor of Newark*, 35 N.J.L. 396.) The mayor is not a mere automaton, bound to place his signature to any document no matter how vicious or illegal, because he has been directed to do so by the council.

5. The illegality in the contract has not been overcome by 8 Edw. VII. c. 22, which purports to authorize councils to enter into certain contracts with the Hydro-Electric Power Commission in a certain form. Sec. 4 of that Act which declares a certain form to be a sufficient compliance with the Act and to make valid any such contracts as therein referred to involves the proposition that the legislature has indirectly dispensed with the

consent required from the ratepayers, but if the legislature intended to permit the municipality to enter into such contracts without the consent of the electorate, such intention would have to be expressly and clearly stated, and not left to implication. (See *Municipality of Brock v. Toronto and Nipissing Ry. Co.*, 17 Grant 433.)

6. That the price of the energy to be supplied is a most material term of the contract and not a matter of form such as referred to in the expression "form of contract" used in s. 4 of the Act.

7. The contention that although the court should be of the opinion that the contract differed materially from the terms approved of by the electorate, the mayor would nevertheless be required to execute it even though proceedings were afterwards taken to declare the contract invalid cannot be entertained. This would be objectionable on the ground of circuitry of action; it would moreover be an abuse of the discretion of the court to order a mandamus to sign a contract which would work a gross breach of faith with the electorate, and contravenes the statute. (See *Rex v. Askew*, 4 Burr. 2189.)

DuVernet, K.C., for the motion. The Mayor of Galt in person.

Cartwright, Master.] SMITH v. CITY OF LONDON. [Sept. 15.

Pleading—Embarrassment—Striking out paragraphs in statement of claim—Parties.

This was a motion to strike out certain paragraphs in the statement of claim in an action which charged misrepresentations on the part of Hon. Adam Beck, as chairman of the Hydro-Electric Power Commission of Ontario, and those acting under him whereby the council of the city was misled on material points, which representations led to the execution of a contract between the Commission and the corporation of the City of London for the supply of electric energy. The plaintiff's action was to have this contract declared invalid and to restrain of council from delivering the contract to the Commission or taking any step to carry it into operation. The Hydro-Electric Power Commission of Ontario was not a party defendant.

CARTWRIGHT, MASTER.—“The motion was supported on two grounds:—Firstly, it was said that charges of misrepresentation are made against the chairman of the Commission and those acting under his authority whereby the council was misled on a material point. It was argued that this was improper because the Commission is not a party to the action. Secondly, it was said that the statement of claim attacks the validity of the By-law No. 2920 although it is therein set out that it has been validated by the legislature. It was said in answer that the paragraphs which are complained of are mainly historical (as in *Morley v. Canada Woollen Mills* (1903) 2 O.W.R. 457-478) and that the relief sought is asked on two grounds: 1st, that the contract is not such as the by-law authorizes; and 2nd, that the council were induced to enter into it through the advocacy and erroneous statements of the agent of the Commission, and it was confidently submitted that the statement of claim contains nothing that is not relevant to these grounds of attack.

The statement of claim is a good deal longer than usual, but is not necessarily objectionable on that account. On the contrary, it gives a full and clear statement of the facts out of which the action proceeded; and of those other facts on which the plaintiff relies to prove his case. It is quite clear that pleadings are not to be reformed in Chambers unless hopelessly bad (and perhaps not always then). As was said by Bowen, L.J., in *Knowles v. Roberts*, 38 Ch. Div., at p. 270: “The court is not to dictate to parties how they should frame their case” though they “must not offend against the rules of pleadings.”

After consideration of the statement of claim it does not appear to me to be open to attack. The validity of the by-law is not in any way attacked. This could scarcely be seriously attempted when the fact of its having been validated is fully set out in paragraph two. Nor is it any objection that the Commissioners or their agents are stated to have misled the council as set out in paragraph nineteen. These are statements, in conformity with the rules of some of the material facts on which the plaintiff will rely and on proof of which he hopes to succeed. The fact that the Commission is not a party is no objection as no relief is asked against that body or any one connected with it.

The motion will be dismissed with costs to plaintiff in the cause.

DuVernet, K.C., for the motion. *Middleton*, K.C., and *J. M. McEvoy*, for plaintiff.

Held, by MEREDITH, C.J.C.P., on appeal from the Master in Chambers, that paragraph 14 should be struck out as being irrelevant and therefore embarrassing.

Seemle, that the plaintiff could take nothing by his suit under the charges of misrepresentation if the Hydro-Electric Commission was not made a party defendant.

Lefroy, for defendants (appellants). *McEvoy*, for plaintiff.

MASTER'S OFFICE—COUNTY OF CARLETON.

WEBSTER v. JURY COPPER MINES.

Company—Employment of agent—Sale of shares—Action for wages—Absence of by-law or resolution of directors—Parol agreement with directors—Sale of shares without prospectus.

Held, that a contract is binding on a company although not under seal and without by-law or resolution of the directors, nor is a meeting of the directors material provided the necessary number concur in making the contract.

[OTTAWA, August 18.—W. L. Scott.

This was an action referred by consent to W. L. Scott, Esq., Local Master at Ottawa, for trial under s. 27 of Arbitration Act.

The defendants were an incorporated mining company, and in May, 1907, the plaintiff, who resided at Ottawa, went, by defendants' request, to Sault St. Marie, with a view to his employment as agent for the sale of the company's stock in Ottawa and elsewhere. After interviews with the president and secretary he attended a meeting of the directors where the matter was further discussed. It was finally arranged that the plaintiff should be employed for two months, at least, at \$100 per month and his expenses paid, and in addition he was to receive 10% commission on all stock sold. No formal resolution was passed. The parol agreement, however, was made on the part of the company by the president and secretary and at least three other directors, and a fourth director, though not present at the meeting, was a party to the agreement and consented to the arrangement. It appears from the evidence that these six formed the entire directorate. The sum of \$100 was paid to the plaintiff on account of expenses. He returned to Ottawa and endeavoured to sell the stock. Later on he assisted the company in preparing

a prospectus. Subsequently the company endeavoured to sell the mine or a controlling interest in it, by selling stock of the shareholders en bloc. The plaintiff at one time succeeded in negotiating a sale of 51% of the stock, but the directors did not consider the price large enough and refused to ratify the sale, and afterwards brought purchasers to inspect the mine. This was in November. During all this period the plaintiff was devoting his time and energies to these efforts to sell the stock in one way or the other. He was in constant communication with the officers of the company. He, however, did not succeed in actually disposing of a single share.

J. J. O'Meara, for plaintiff. *A. C. Boyce*, K.C., for defendants.

THE MASTER:—The first question is, was there ever a valid contract binding on the company? I think there was. It seems quite clear from the authorities that no by-law or seal was necessary. The Companies Act, R.S.O. 1897, c. 191, s. 47, provides that the directors may make by-laws for the appointment of "officers, agents, and servants," but it follows from *Bernadin v. Municipality of North Dufferin*, 19 S.C.R. 581, that "may" is permissive only, and does not prohibit corporations from exercising their jurisdiction otherwise than by by-law. This conclusion also follows from *Gold Leaf Mining Co. v. Clark*, 6 O.W.R. 1035. The by-law that was there held to be a condition precedent was a by-law for the issue of stock at less than par, and that has no application here. That a formal resolution was unnecessary is less clear. By s. 46 of the Companies Act, "the directors of the company shall have full power in all things to administer the affairs of the company; and may make or cause to be made for the company any description of contract which the company may by law enter into." A president has unusually wide powers, but these must be conferred by by-law, and no by-law is proved here. Moreover, it was not with the president alone, but with the directors present at the meeting, including the president, that the bargain was made. It was argued on the authority of *D'Arcy v. Tamar Kit Hill and Callington R.W. Co.*, L.R. 2 Ex. 158, that directors exercising their powers must act together and as a board; and the only way a board can speak is by formal resolution; but see the later case of *In re Bonelli's Telegraph Co., Collie's claim*, L.R. 12 Eq. 246, a case very like the present. In that case, by the articles of incorporation of

the company it was provided that three directors should form a quorum; and that the directors should have power at their discretion to sell the company's business; and also at their discretion to appoint agents; any such agents to be remunerated at the discretion of the directors. The directors, without any resolution, or in fact any meeting at which all were present, entered into an agreement with Collie to pay him a commission on any sale effected for more than a specified amount. This was signed by two directors in London, was then mailed to Manchester, where it was signed by two others, and was finally handed to Collie. On the sale's going through, Collie was held entitled to recover the commission from the official liquidators of the company. The case of *D'Arcy v. Tamar Kit Hill and Callington R.W. Co.* was referred to and distinguished. Sir James Bacon, V.-C., who rendered the decision, says (p. 258): "Then it is said that the formal authority to enter into the agreement was wanting, for that the article providing that the acts of directors shall be binding means that they shall act in their combined wisdom. . . . I quite agree that the 'combined wisdom' is required in this sense that they must all be of one mind, but I do not know that it is necessary that they shall all meet in one place. . . . If you are satisfied that the persons whose concurrence is necessary to give validity to the act did so concur, with full knowledge of all that they were doing, in my opinion the terms of the law are fully satisfied, and it is not necessary that whatever is done by directors should be done under some roof, in some place where they are all three assembled." A fortiori then, where, as in the present case, directors meet formally and unanimously agree to hire the plaintiff on certain specified terms, and the plaintiff goes on and does his part, the company cannot afterwards escape liability on the ground that no formal resolution was entered in the minutes. In *Hamilton and Port Dover R.W. Co. v. Gore Bank*, 20 Gr. 190, where an informal agreement was sought to be enforced, much importance was attached to the question of whether or not the directors in fact knew of the terms of the agreement which certain of their number had purported to authorize. No such question can arise here, for the agreement was, as I have said, not only known to but authorized by all of the directors.

It is next contended that no stock could legally be sold without the publication of a prospectus, and that, none having been published, the plaintiff, who was employed to sell stock,

cannot recover. I can see nothing in this contention. Under 6 Edw. VII. c. 27, s. 2, s.-s. 3, sales of stock are voidable at the option of the purchaser when no prospectus has been shewn him; but that is a matter for a purchaser to raise. I know of no principle on which the defendants can set up their failure to issue a prospectus in answer to the present claim. It was the duty of the defendants, not of the plaintiff, to issue the prospectus, and it is not even pretended that the absence of one stood in the way of any sale of stock.

The plaintiff is entitled to judgment for the amount claimed for salary.

Province of Nova Scotia.

SUPREME COURT.

Drysdale, J.]

IN RE G. T. N. MILLER.

[August 12.]

Administration—Power of sale—Trustee Act.

M. by his will appointed his daughter A. sole executrix and trustee with full power as such to sell any portion of his estate for the purpose among other things of obtaining and setting apart a principal fund and applying a sufficient income therefrom to the support and maintenance of an invalid son. After the death of A., her son, the respondent G., undertook without being duly authorized thereto to carry out the trusts under the will of M. One of the beneficiaries under the will of M. commenced proceedings under the Trustee Act praying for administration of the estate of M., for the appointment of a new trustee in the place of A., and for an accounting by G.

Held, 1. That the prayer of the petition must be granted.

2. That the power of sale contained in the will under the trust for the son remained in the executor and that resort must be had to the executor to sell any land required to carry out the trust.

3. That the trust in favour of the son attached to the office of trustee and the power to sell and to carry on the trust was in one and the same person.

4. That the respondent G. could not have his costs of opposing the motion paid out of the estate.

R. E. Harris, K.C., for the petitioner. *W. B. A. Ritchie*, K.C., for respondent.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] ADAMS *v.* MONTGOMERY. [July 15.

County Courts Act, R.S.M. 1902, c. 38, ss. 60(d), 61—Jurisdiction of County Court—Injunction—Garnishment—Fraudulent conveyance.

The plaintiff, having entered suit in the County Court against the defendant for the amount of a promissory note, sought to attach certain money owing or accruing due from the garnishee to the defendant's wife on the sale of a parcel of land by her to the garnishee, alleging that this land was held by the wife as trustee for the debtor, and obtained from the County Court judge the common order garnishing moneys due to the primary debtor and also an order prohibiting the garnishee from paying over any money to the defendant's wife until it should be determined whether the money was an asset of the debtor or not.

Subsequently, judgment having been recovered by the plaintiff for the debt, he obtained an order for the trial of an issue to determine such question.

Held, that the County Court had no jurisdiction to make the order staying payment to the wife and that the order for the trial of the issue fell with it and that both orders should be set aside with costs.

Donohoe v. Hull, 24 S.C.R. 683, followed.

Monkman, for plaintiff. *Coyne*, for Mrs. Montgomery.

KING'S BENCH.

Macdonald, J.] HALSTED *v.* HIRSCHMANN. [July 15.

Promissory note—Garnishment.

The garnishees borrowed \$500 from the defendant and gave him an instrument in the following form. "Winnipeg, June 20th, 1907. Received from P. Hirschmann the sum of five hundred dollars advance to be repaid at expiration of 9 months.

W. & M." The defendant indorsed and transferred the instrument to one Hugo Hirschmann on March 16th, 1908, for value received.

Held, that this instrument was a negotiable promissory note and the money payable under it was not attachable by garnishment proceedings during its currency.

A. B. Hudson, for plaintiff. Burbidge, for defendant.

Mathers, J.]

MONROE v. HEUBACH.

[July 17.]

Contract—Agreement for sale of land—Stipulation for formal contract—Waiver—Interest.

Action to recover payment of one instalment of purchase money under an agreement of sale of land in the form of a written option signed by the plaintiffs and accepted in writing by the defendant. The option contained all necessary terms of the proposed purchase including a provision that, should the defendant sell any portion of the lands, the plaintiff would execute a transfer or conveyance of the lands sold provided that the amounts had been agreed upon between the plaintiffs and the defendant and, in the event of their being unable to agree, then provided the selling price was at a fair valuation to be determined by the named arbitrators. It contained also a clause providing that upon the exercise of the said option a formal agreement of sale should be entered into between the parties containing such terms and conditions as are suitable and usually contained in the form of agreement of sale in common use by the firm of Tupper, Phippen & Co. The letter of acceptance also contained the defendant's statement; "I shall be pleased to have you arrange for the preparation of the formal agreement of sale." No formal agreement was ever prepared or executed, but the defendant, before the due date of the instalment sued for, entered into an agreement for the sale of a considerable portion of the property and applied for and obtained a conveyance of such portion from the plaintiffs upon payment of an amount agreed upon between the parties.

Held, 1. There was a complete contract between the parties enforceable by the plaintiffs notwithstanding the absence of the more formal agreement contemplated. The principles laid

down by Lord Westbury in *Chinnock v. Marchioness of Ely*, 4 DeG. J. & S. 638, adopted.

2. If it had been otherwise, the defendant had waived his right to have a formal agreement executed by making the sale referred to.

3. The defendant, having exercised rights of possession of the property by making such sale and not having set apart the money for the instalment by depositing it in a bank or other proper place of deposit in a separate account, was liable to pay interest on the amount from the due date although there was some delay on the plaintiffs' part in making title: *Stevenson v. Davies*, 23 S.C.R., at p. 631.

A. B. Hudson and *A. V. Hudson*, for plaintiffs. *Galt*, for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.]

IN RE NARAIN SINGH.

[July 29.

Costs—Against the Crown—Whether they can be awarded.

The court will, and when occasion requires, should give costs either for or against the Crown. *Reg. v. Little* (1898) 6 B.C. 321 followed.

A. D. Taylor, K.C., for the Crown. *Brydone-Jack*, contra.

Hunter, C.J.]

REX v. SHEEHAN.

[Sept. 1.

Criminal law—Vagrancy—Means of support—Gambling—Evidence—Code s. 207 (a).

Accused, when arrested, had on his person \$27.20. Evidence was given that he lived by "following the race track," and that his general associates were gamblers and other criminal classes.

Held, that, although he might be convicted under s.-s. (1) of s. 238 of the Code, yet he could not, on the evidence, be convicted

of being a loose, idle, disorderly person with no visible means of support; and that evidence that the money found on his person was obtained by gambling was immaterial.

Lowe (Moresby & O'Reilly), for the accused. *Helmcken*, K.C., for the Crown and the magistrate.

Hunter, C.J.]

REX v. REGAN.

[Sept. 14.

Criminal law—Certiorari—Idle and disorderly person—Necessity for person charged to properly account for herself—Police officer—Disclosure of his authority to accused person.

A police detective, in plain clothes, questioned accused as to what she was doing in a certain house. He did not inform her that he was an officer.

Held, that the officer should have first disclosed his authority, and then expressly asked the accused to give an account of herself.

Lowe (Moresby & O'Reilly), for the accused. *Morphy*, for the Crown.

Flotsam and Jetsam.

HIS EYE ON THE CLOCK.—A fourteen year old boy recently testifying in a New York city court was quite positive as to the time a certain accident occurred. The opposing counsel, to test his ability in such matters, asked him to estimate a period of three minutes. When the boy finally said the time was up, he was found right to the second. The lawyer hastily excused him, but afterwards discovered that, all the time, the boy had been looking at the court-room clock directly over the lawyer's head.

HAD FORGOTTEN ABOUT HER.—A San Francisco man, testifying in Washington not long since in a land case, was asked if he knew a woman named Pearl E. R——. For a minute or two he seemed to be struggling to remember. Finally his face lighted up, and he said: "Why, yes, I remember it now. She was my wife once. We were divorced eight years ago."

"Have you," asked a judge of a prisoner just convicted, "anything to offer to the court before sentence is passed?" "No, your honor," remarked the prisoner regretfully, "my lawyer took the last cent."

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THE REVOCATION OF TREATY PRIVILEGES TO ALIEN-SUBJECTS.

International Treaties, or Conventions, may be divided into two classes. One class may prescribe and define the sovereign international relations, rights, duties, privileges, and obligations of the respective Treaty-contracting nations, such as relate to peace and war, contraband of war, neutrality, alliances, guarantees, or to the territorial possessions, or boundaries, of their respective nations; or such other questions of *la haute politique extérieure*, as may affect their sovereign relations, *inter se*, as members of the Society of Nations.

Another class of Treaties may concede the allowance, and prescribe the conditions, of subordinate, or "alien-subject," privileges or commercial concessions, under which the alien-subjects of another nation may be privileged to share with home-subjects of the conceding nation, in certain of their natural rights respecting the trade and commerce, territorial admission, transit, residence, privilege of coast-fisheries, or user of territorial easements to all, or to designated classes, of the subjects, or citizens, of another nation. This class of alien-subject or commercial Treaty concessions comes within the doctrine of International Law that: "A State may voluntarily subject itself to obligations to another State, both with respect to persons and things, which would not naturally be binding upon her. These are *servitutes juris gentium voluntariæ*."¹ Other classifications of Treaties have been made by various authorities on International Law, which divide them into more classes than those suggested above.²

The generally assumed doctrine of International Law on the question of the prerogative power of nations to vary, or abro-

¹ Phillimore's *International Law* (3rd ed.), vol. 1, p. 391.

² Hall's *International Law* (5th ed.), p. 360.

gate, Treaties has been thus stated: "Private contracts may be set aside on the ground of what is technically called in English law the want of consideration, and the inference arising from manifest injustice, and want of mutual advantage. But no inequality of advantage, no *lésion*, can invalidate a Treaty."³ Further, as Vattel says: "An injury cannot render a Treaty invalid. If we might recede from a Treaty because we found ourselves injured, there would be no stability in the contracts of nations."⁴ But without impeaching this assumed doctrine as applicable to Treaties which deal with the higher international rights and responsibilities of nations, as sovereignties, it will be found that it has not been universally accepted by other authorities on International Law as applicable to, gratuitous, or reciprocal, commercial or residential privileges, or territorial easements, conceded to the subjects or citizens of foreign nations; nor by some nations in the higher relations of sovereignties inter se; as when Russia in 1871 sought to revoke the provision in the Treaty of 1856, which "in perpetuity interdicted to the flag of war" the Black Sea and its coasts. The protocol of the signatory Powers to the original Treaty declared that "it is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the contracting Powers, by means of an amicable arrangement."⁵ To apply such an absolute doctrine to Treaty concessions respecting trade and commerce, coast fisheries, transit of persons or goods, residential, or other privileges in certain natural rights of the home-subjects of a conceding nation, to the alien-subjects of another nation, would involve the unconditional surrender of an inherent and inalienable prerogative of territorial sovereignty; in other words a perpetual national servitude to the alien-subjects of another nation, which would be an international degradation of its amour propre as a nation,—not sovereign independence and international equality.

³ Phillimore's International Law (3rd ed.), vol. 2, p. 76.

⁴ Vattel's Law of Nations, p. 194.

⁵ Wheaton's International Law (1878), p. 712.

Of the nations which have not accepted the above in its entirety as a recognized doctrine of International Law, the United States has been the most pronounced, for it has furnished the largest number of modern instances of the exercise of the legislative and prerogative powers of variation, or abrogation, of Treaties entered into by it with foreign nations. And respecting the second, or "alien-subject," or commercial, class of Treaties, its Supreme Court has said: "A Treaty may also contain provisions which confer certain rights upon the citizens, or subjects of one of the nations within the territorial limits of the other, which partake of the nature of local municipal law, and which are capable of enforcement as between private parties in the courts of the country. The Constitution of the United States places such provisions as these in the same category as other laws of Congress, and they may be repealed, or modified, by an Act of a later date,"* without the assent of the foreign nation with which the Treaty had been made.

By the Constitution of the United States, its legislative powers are vested in two departments of the Supreme Government: (a) by Article I., which provides that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives;" and (b) by Article II., which provides that "the President shall have power, by and with the consent of the Senate, to make Treaties, provided that two-thirds of the Senators present concur."

Then Article VI. declares that three instruments, viz. :—

"(a) This Constitution and (b) the laws of the United States which shall be made in pursuance thereof, and (c) all Treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges of every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

These articles of the Constitution received an early interpretation by Chief Justice Marshall in their Supreme Court:

* *Head Money Cases* (1884), 112 U.S. 580.

"Where a Treaty is the law of the land, and as such affects the rights of parties litigating in court, that Treaty as much binds those rights, and is as much to be regarded by the court, as an Act of Congress." And the repealing effect of a Treaty over the previous legislative Acts of State Legislatures had been earlier declared by the same Supreme Court, that "a Treaty, as the supreme law, overrules all State laws on the same subject, to all intents and purposes."

It may be conceded generally that whenever, under a constitutional government, a Treaty becomes operative by itself, its confirmation by a legislative act is not necessary. But where it imports a contract, or where money is required to be appropriated, or fiscal revenue affected, or territory to be ceded, in each of such cases a legislative act becomes necessary before the Treaty can be given the force of law; for the public money cannot be appropriated, nor fiscal charges be varied, nor national territory be ceded, (except as a result of war), by the Treaty-making power of a Government.*

By the exercise of the legislative and judicial process of constitution-making assumed by the Congress and courts of the United States, it has been legislatively and judicially determined that Treaties made by the United States with foreign nations are subject to the same Congressional power of variation, or abrogation, as are the ordinary legislative Acts of Congress.

This Congressional power of abrogation was first exercised by the United States in 1798, by "An Act to declare the Treaties heretofore concluded with France no longer obligatory on the United States." After a preamble reciting, among other grounds, that the Treaties with France had been "repeatedly violated on behalf of the French Government," it enacted "that

* *United States v. Schooner Peggy* (1801), 1 Cranch (U.S.), 103.

* *Ware v. Hylton* (1796), 3 Dallas (U.S.), 199; *Passenger Tax Cases* (1849), 7 Howard, 283; *Moore's Digest of International Law*, vol. 5, ss. 777 and 778.

* *American and English Encyclopædia of Law* (2nd ed.), vol. 28, p. 480; *Damodhar Gordham v. Deoram Kanji* (1876), 1, Appeal Cases, 332.

the same shall not henceforth be regarded as legally obligatory on the Government or citizens of the United States."¹⁰

The alleged cause was a decree, or legislative act, of the French Directory of 1796 which declared that "every vessel found at sea, loaded in whole or in part with merchandise the production of England, or of her dependencies, shall be declared good prize, whoever the owner of the goods or merchandise may be," thereby abrogating the Treaty of 1778, which provided that "free ships shall give freedom to goods on board of the ships of the subjects of either nation, contraband goods excepted."¹¹

A case with Russia affecting this subordinate class of trade and commerce, under a Treaty of 1832, under which it was claimed that no higher duty than 25 dollars per ton should be chargeable on Russian hemp, raised a similar question. By a subsequent Act of Congress the duty was raised to 40 dollars per ton. An action was brought in a United States court for a refund of the extra duty; but the court said: "To refuse to execute a Treaty for reasons which approve themselves to the conscientious judgment of a nation is a matter of the utmost gravity and delicacy, but the power to do so is prerogative, of which no nation can be deprived without deeply affecting its independence."¹² In a later case, involving the same question, the court said: "Congress may render a Treaty inoperative by legislation in contradiction of its terms without formal allusion at all to the Treaty; thus modifying the law of the land without denying the existence of the Treaty or the obligations thereof between the two Governments as a contract."¹³

This latter mode has been applied to Canada on more than one occasion by the United States. Shortly after Jay's Treaty of 1794, the Executive of the United States nullified the 3rd Article of that Treaty, which provided that "it shall at all times be free to the subjects and citizens of both nations freely to pass

¹⁰ *Statutes at Large* (U.S.), vol. 1., p. 578, c. 67.

¹¹ *American State Papers, Foreign Relations*, vol. 2, pp. 169-182.

¹² *Taylor v. Morton* (1855), 2 Curtis (U.S.), 454.

¹³ *Ropes v. Clinch* (1871), 8 Blackford (U.S.), 304.

and repass, by land or internal navigation, into the respective territories of the two nations, and freely to carry on trade with each other." It further provided that all goods and merchandise (not prohibited by law) should "freely, for the purposes of commerce, be carried into the United States by His Majesty's subjects; and such goods or merchandise shall be subject to no higher duties than those payable by the citizens of the United States on importations of the same on American vessels into the Atlantic ports of the said States." The duty payable on such importations at the Atlantic ports was 16½ per cent., but the United States enforced the payment by Canadians of a duty of 22 per cent. at the inland ports along the Canadian boundary line; and also a fee of 6 dollars for a license to trade with the Indians, not chargeable against American traders;" and so turned into diplomatic irony the closing words of the Article:—

"As this Article is intended to render in a great degree the local advantage of each party common to both, and thereby to promote a disposition favourable to friendship, and good neighbourhood, it is agreed that the respective Governments will mutually promote this amicable intercourse, by causing speedy and impartial justice to be done, and necessary protection to be extended to all concerned therein."¹⁴

A similar policy was adopted in 1875 by Congress imposing a customs duty on the tin cans in which Canadian fish and fish oil were entitled by Article 21 of the Treaty of Washington of 1871 to be imported into the United States "free of duty." The Act of Congress enacted: "That cans or packages made of tin or other material, containing fish of any kind admitted free of duty under any law or Treaty,"¹⁵ shall be subject to a specific duty, though the tin cans when opened were necessarily destroyed, as unsaleable and useless. The effect of this legislation was declared by the British Minister to "prohibit entirely the importation of fish from Canada into the United States, and to render the stipu-

¹⁴ American State Papers, Foreign Relations, vol. 3, p. 152.

¹⁵ Treaties and Conventions between the United States and Other Powers, p. 319.

¹⁶ Statutes at Large (U.S.), vol. 18, p. 308, c. 36.

lation of the Treaty illusory."¹¹ Canada imposed no retaliatory duty on American tin cans containing fish or fish oil imported into Canada under the same Article.

The diplomatic relations between the United States and China furnish several illustrations of the Congressional revocation of Treaties conceding municipal and reciprocal international privileges, or concessions, to the subjects of that Empire.

By what is known as the Burlinghame Treaty with China of 1868, it was provided that citizens of the United States visiting, or residing, in China, and Chinese subjects visiting, or residing, in the United States, should reciprocally enjoy the same privileges, immunities and exemptions in respect to travel or residence as may then be enjoyed "by the citizens or subjects of the most favoured nation;" and that they should also reciprocally enjoy all the privileges and immunities of the public educational institutions under the control of either nation "as are enjoyed in the respective countries by the citizens or subjects of the most favoured nation."

The first Congressional variation of the provisions of this Treaty was made in 1875, by which contracts of service with Chinese subjects were declared void within the United States.¹²

In 1880, another Treaty with China provided that the Government of the United States might regulate, limit, or suspend the coming or residence, of Chinese labourers in the United States, "but may not absolutely prohibit it."¹³

Notwithstanding the Treaty concession of such reciprocal residential, educational, and trade privileges "as were accorded to the citizens, or subjects, of the most-favoured nation," Congress passed an Exclusion Act in 1888, depriving Chinese subjects of certain Treaty privileges.¹⁴ On appeal, the Supreme Court held that "the Exclusion Act of 1888 was in contravention of the express stipulations of the Treaty of 1868 and of the Sup-

¹¹ Canada Sessional Papers (1877), vol. 10, No. 14, p. 6.

¹² Statutes at Large (U.S.), vol. 18, p. 477, c. 141.

¹³ Compilation of Treaties in Force (U.S.), 1899, p. 118.

¹⁴ Statutes at Large (U.S.), vol. 25, pp. 476 and 504, cc. 1015 and 1064.

plementary Treaty of 1880;" and that it was "a constitutional abrogation of the existing Treaties with China;" adding:—

"The power of the exclusion of foreigners, being an incident of sovereignty belonging to the Government as part of the sovereign powers delegated by the Constitution, the right to its exercise at any time, when, in the judgment of the Government, the interests of the country require it, cannot be granted away, or restrained, on behalf of anyone. The powers of Government are delegated in trust and are incapable of transfer to other parties. Nor can their exercise be hampered when needed for the public good. The exercise of these public trusts is not the subject of barter or contract. Whatever license Chinese labourers may have obtained is held at the will of the Government, revocable at any time at its pleasure. Unexpected events may call for a change in the policy of the country. . . . But far different is the case where a continued suspension of the exercise of a prerogative power of abrogation is insisted upon as a right, because by the favour and consent of the Government of the nation it has not heretofore been exercised. The rights and interests created by a Treaty which have become so vested that its expiration, or abrogation, will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer, or other disposition; not such as are personal and intransferable in their character. . . . Between property rights not affected by the termination, or abrogation, of a Treaty, and expectations of personal benefits from the continuance of existing Treaty legislation, there is as wide a difference as between realization and hopes."²²

And the Supreme Court also held that the sovereign and legislative powers of the Government to exclude aliens from the territory of the United States, who claimed the Treaty privilege of entering its territory, was incident to the inherent and inalienable prerogatives and sovereignty of the nation, which could not be surrendered in perpetuity to the subjects of foreign nations by the Treaty-making power of that Government; and that such Treaty privilege of entering the territory of the United States was "during pleasure," and was revocable at any time whenever the sovereign interests of the Government demanded it, or when-

²² Chinese Exclusion Cases (1889), 130 U.S. 581.

ever the natural rights of its citizens were injuriously affected. This inherent prerogative of sovereignty to exclude aliens from British territory, and to prescribe what conditions it pleases to the permission to enter and reside in it, has been approved by the Judicial Committee of the Privy Council, and is therefore equally the law of the British Empire.²² And the doctrine of International Law concurs that: "no stranger is entitled to enter the boundaries of a State without its permission, much less to interfere with its full exercise of supreme dominion."²³

The Supreme Court's decision as to "intransferable privileges" harmonizes with the Roman Law which declares: "Servitudes personales include usufructus, and are enjoyable by sufferance, or forbearance, and so are subject to the jure domini. The usufructuarius cannot alter the form of the grant of the thing which the dominus utilis can. The first cannot grant away his right, the latter can. Such rights as these are for mutual accommodation, and are consequently of a private nature; but they will not be valid where they perniciously affect the public good."²⁴

The fishery privileges conceded to the "inhabitants of the United States" of the trade class of "American fishermen" by the Treaty of 1818, are within this rule as being privileges intransferable to other trade classes in the United States.

These decisions have now become incorporated into the International Law of the United States; and have attained the authority of precedents controlling the Treaty-making power of that Government respecting the class of Treaties conceding alien-subject, or commercial, privileges in what are defined as "the natural rights of home-subjects;" and must therefore be accepted as exceptions to the generally assumed doctrine of International Law, quoted in the beginning of this article; and as establishing a distinction in the applicability of that assumed doctrine between Treaties respecting the higher international

²² *In re Adam* (1837), 1 Moore, P.C. 460; *Attorney-General of Canada v. Cain* (1906), Appeal Cases 542.

²³ Phillimore's *International Law* (3rd ed.), vol. 1, p. 221.

²⁴ Colquhoun's *Roman Civil Law*, vol. 2, pp. 17 and 93.

right and relations which affect nations, as sovereignties inter se, and Treaties which concede alien-subject, or commercial, privileges in the natural rights of the home-subjects, or citizens, of the conceding nation. For a consistent succession of precedents have an authentic force in International Law, and are also invaluable in diplomacy. And if accepted as authoritative precedents by other nations, governing their Treaty-making powers with the United States, their international force cannot fairly be repudiated by its Government, as not being equally within the inherent prerogative powers of such other nations; nor questioned on the ground that such nations are not entitled to recognize and apply them as reciprocal and authoritative precedents in their international relations with the United States.

The ratio suatoria of these precedents seems to lead to this conclusion: The prerogatives of sovereignty are regal trusts vested in the sovereign as the executive authority of the nation, for the protection of the natural rights and property of his subjects, and for the promotion of their welfare and good government; and that in the execution of the regal trust of the maintenance of the territorial inviolability and sovereignty of the nation, it is not unlimitedly within the treaty-making power of such executive authority as the temporary trustee of the national sovereignty, to concede to a foreign nation for the benefit of the commerce, or municipal purposes or privileges, of its subjects, or citizens, either for a limited time, or in perpetuity, or "in common with the home-subjects," any interest, easement, or privilege; in the natural, or public property, rights to which the home-subjects are entitled. But wherever such executive authority concedes gratuitously, or reciprocally, either by Treaty, or by what is known as Comity,² any such interest or easement, or privilege, in the natural rights or the public property of the home-subjects, to the alien-subjects or citizens of a foreign nation, such concessions are "during pleasure," and are always subject to

² "Comity extended to other nations is no impeachment of sovereignty. It is the voluntary act of a nation by which it is offered; and it is inadmissible when contrary to its policy, or prejudicial to its interests." *Bank of Augusta v. Earle* (1839), 13 Peters (U.S.), p. 589.

the inherent prerogative right of revocation at any time, whenever the natural rights in the public property, or the welfare, of the home-subjects, or the interests of state policy, or the maintenance of the territorial inviolability and sovereignty of the conceding nation, require such revocation.

And, sustaining this reasoning, and also the claim of the natural rights of subjects in the public property of their nation, of which the coast fisheries form a part, Vattel is equally explicit:

“It is very just to say that the nation ought carefully to preserve her public property and not to dispose of it without good reason, nor to alienate, or charge it but only for a manifest public advantage, or in case of a pressing necessity. The public property is extremely useful, and even necessary to the nation; and she cannot squander it improperly without injuring herself, and shamefully neglecting the duty of self-preservation. As to the property common to all the citizens, the nation does an injury to those who derive advantage from it, if she alienates it without necessity, or without cogent reasons. . . . The prince, or the superior of the society, being naturally no more than the administrator, and not the proprietor, of the State, his authority as sovereign, or head of the nation, does not of itself give him a right to alienate, or charge, the public property. The right to do this is reserved to the proprietor alone, since proprietorship is defined to be the right to dispose of a thing substantially. If he exceeds his powers with respect to this property, the alienation he makes of it will be invalid; and may at any time be revoked by his successor, or by the nation.” . . . “The rules we have just established relate to alienations of public property in favour of alien individuals.”*

Respecting Treaties which concede voluntary, or unequal, servitudes, without reciprocal privileges, or concessions, Haute-feuille sustains the exception to the generally assumed doctrine of International Law, quoted above, and says:—

“Treaties are in general obligatory on the nations which have consented to them; however they have not this quality in an absolute manner, (*cependant ils n'ont pas cette qualité d'une manière absolue*). The unequal Treaty, or even the equal, con-

* Vattel's Law of Nations, pp. 116-7.

ceding the gratuitous, or free, cession, or surrender, of an essential natural right,—that is to say, without that which a nation cannot be considered as existing still as a nation, such for example with even partial independence, [these Treaties] are not binding, (ne sont pas obligatoires). They exist as long as the two nations persist in desiring their existence. But each of the two nations had always the right to discontinue, (le droit de les rompre), that which affects the cession of an important natural right by anticipating the other party in denouncing the Treaty. The reason of the invalidity of transactions of this nature is that these natural rights of this quality are inalienable; and to make use of an expression of the civil law, they are “out of commerce,” (“hors le commerce”). It is so of Conventions alike equal in which essential natural rights are affected, which operate only on the private, and secondary, interests of the people. But even if they have been declared perpetual, they have no existence but by the continuation of the two wills which have created them. The stipulation of perpetuity has no other effect than to avoid the necessity of renewing the Convention.””

Other authorities express similar views. Heffter says that a State may repudiate a Treaty when it conflicts with “the rights and welfare of its people.” Bluntschli says that while a State may be required to perform the onerous engagements it has contracted, it may not be asked to sacrifice, in the execution of Treaties, that which is incompatible with its potentiality, or the development of its resources; or to perform acts which have become greatly modified by time, and their execution has become incompatible with present affairs; and it may consider such Treaties null.” Fiore says that “Treaties are to be looked upon as null which are in any way opposed to the development of the free activity of a nation, or which hinder the exercise of its natural rights.” Vattel concurs that “A Treaty pernicious to the State is null, and not at all obligatory. The nation itself being necessarily obliged to perform everything required for its

”Hautefeuille's *Des Droits et Des Devoirs des Nations Neutres* (3me ed.), vol. 1, p. xiii. “Hautefeuille is the author of the ablest Treatises on the science of International Law that have appeared in France.” Wheaton on International Law, by Lawrence, p. 21n.

”Bluntschli's *Droit International Codifié* (5me ed.), pp. 224 and 263.

preservation and safety, cannot enter into engagements contrary to its indispensable obligations." And he cites, as an illustration, that "in the year 1506 the States-General of the Kingdom of France engaged Louis XII. to break the Treaty he had concluded with the Emperor Maxmillian and the Arch-Duke Philip, his son, because that Treaty was pernicious to the kingdom. They also decided that neither the Treaty, nor the oath that had accompanied it, could be binding on the King, who had no right to alienate the property of the Crown."²

But, while these authorities are not entirely concurred with by some English writers, one writer, however, who does not concur, admits that internationally, as no superior coercive power exists, and as enforcement is not always convenient, or practical, to the injured party, the individual State must be allowed in all cases to enforce, or annul, for itself as it may choose."³

It was well said by Chief Justice Jay, of the Supreme Court of the United States, that "the contracts of sovereigns are made for the benefit of all their own subjects; and therefore every sovereign is interested in every Act which necessarily limits, impairs, or destroys that benefit. Whatever injuries result to the subjects run back from them to their sovereign." And he further said that a voluntary validity of a Treaty is that validity by which a Treaty that has become voidable by reason of violations, afterwards continues to retain validity by the silent volition and acquiescence of the nations concerned;⁴ or, in other words, "during pleasure."

It would seem, therefore, to be reasonable in the international and diplomatic interests of other nation sovereignties that the doctrine which those precedents sanction, and which the United States has heretofore enforced, and has thereby incorporated into its administration of International Law, should be recognized as an authoritative doctrine of general International Law,

² Vattel's *Law of Nations*, p. 194.

³ Hall's *International Law* (5th ed.), 352 and 358.

⁴ *Jones v. Walker*, 2 Paine (U.S.), 688.

governing the class of Treaties which concede to the alien-subjects of a privileged nation, commercial and residential privileges, or territorial easements, or privileges of sharing in the natural rights and public property of the home-subjects of the conceding nation.

Of the many Treaties between Great Britain and Foreign Nations, few appear to have caused so much international friction and diplomatic controversy as those which deal with the Treaty relations between Great Britain, on behalf of Canada and Newfoundland, and the United States; especially the gratuitous concession of the trade privileges set out in the Fishery Article of the Anglo-American Treaty of 1818, by which Great Britain generously conceded to "the inhabitants of the United States," of the trade of "American fishermen," to have "forever, in common with the subjects of His Britannic Majesty," (1) the liberty to take fish of every kind in the Canadian coast-waters along the shores of the Magdalen Islands, and from Mount Joli to Blanc Sablon, on the Quebec Labrador coast of Canada; and in the Newfoundland coast-waters from the Rameau Islands to Cape Ray and round to the Quirpon Islands along the southern, western and northern coasts of Newfoundland; and from Blanc Sablon, along the southern and eastern coasts of Labrador to and through the Straits of Belle Isle, and thence northwardly, indefinitely, along the said Labrador coast of Newfoundland;" with (2) the "liberty for ever" to dry and cure fish "in any of the unsettled bays, harbours and creeks" on the southern coast of Newfoundland from the Rameau Islands to Cape Ray; and (3) the further liberty to enter all British Colonial bays, or harbours, "for shelter, or repairing damages, or procuring wood and water."² And the Treaty then declares that these three fishery privileges to American fishermen shall be subject to "such Restrictions as may be necessary to prevent their taking, drying, or curing fish (in certain bays or harbours), or in any other manner whatever abusing the privileges reserved to them."

² Treaties and Conventions between the United States and Other Powers, p. 350.

As stated by Hautefeuille, the stipulation "for ever" in this class of Treaties, is to avoid the necessity of renewals, and is not therefore, indefinitely, or in perpetuity, binding on the conceding nation.

And here it may be claimed that, in any event, this "liberty to take fish," in common with British subjects, cannot be construed to permit the assertion of any jarring claim on the part of American fishermen of an immunity from British and Colonial laws regulating fishing within the Treaty coast-waters, or of any claim of right, or privilege, which could in any way limit, or prejudice, the earlier, or pre-treaty, natural right, or privilege, of the colonial subjects of the Crown to fish in their own coast-waters.

The War of 1812-14 abrogated the previous fishing privileges conceded to American fishermen by the Treaty of Independence of 1783; and during the negotiations for the Treaty of Ghent of 1814, the British Plenipotentiaries informed the American Commissioners that "the privileges formerly granted to the United States of fishing within the limits of British coast-waters, and of landing and drying fish on British-Colonial coasts, would not be renewed gratuitously, or without an equivalent,"²² But in 1818, the British Government gratuitously reversed this policy by intimating to the American Secretary of State that "in estimating the value of these proposals" (of fishery privileges in the coast-waters of Canada and Newfoundland), "the American Government will not fail to recollect that they are offered without any equivalent," of either a financial consideration, or of a reciprocal privilege of fishing within United States coast-waters;²³ a proposal which may bring this gratuitous concession of a colonial natural right of property within Hautefeuille's class of "unequal Treaties," which he says "are not binding;" and which Bluntschli and Fiore class as "null."

The territorial coast mileage of these gratuitous fishing privileges to American fishermen extends along about 870 miles of the

²² American State Papers, Foreign Relations, vol. 3, pp. 705 and 708.

²³ Ibid., vol. 4, p. 365.

Canadian coast-waters, and about 1,790 miles of the Newfoundland coast-waters, or about 2,660 miles of the teeming fish-wealth of these British-American waters.

Furthermore, this concession has long been an "entangling alliance," which has been productive of much international friction with the United States, chiefly caused by the assertion by its Government of untenable claims of the immunity of American fishermen from the British and Colonial fishery and customs laws, which are binding on the Colonial subjects of the Crown; and also caused by some grave instances of the misuse by American fishermen, of the fishery privileges within the Colonial coast-waters.

The earliest misuse of these fishery privileges by American was not of fair competition that His Majesty's Government have fishermen was thus summarized by Lord Bathurst in 1816: "It reason to complain, but of the pre-occupation of British harbours by the fishery vessels of the United States, and the forcible expulsion of British vessels from places where their fisheries might be advantageously conducted."²⁸ And later by Lord Salisbury, forwarding to the United States Government the report of the Naval Officer at Newfoundland in 1878: "The report appears to demonstrate conclusively that the United States fishermen committed three distinct breaches of the law; and that in the case of a vessel whose master refused to desist from fishing on Sunday, in violation of the law of the colony, threatened the Newfoundland fishermen with a revolver." The breaches of the law were: (1) fishing with purse-seines; (2) fishing during the close season; and (3) fishing on Sunday. The Naval Officer further reported that the American fishermen were interfering with the rights of British fishermen, and their peaceful use of the coast occupied by them, and of their huts, gardens, and lands granted them by their Government."²⁹

The reply of the United States to this was the assertion of the immunity of American fishermen from British laws, which

²⁸ *Ibid.*, vol. 4, p. 356.

²⁹ *Foreign Relations (U.S.)*, 1878-9, p. 285.

was thus met by Lord Salisbury in 1878: "I hardly believe that Mr. Evarts would, in discussion, adhere to the broad doctrine which some portion of his language would appear to convey, that no British authority has a right to pass any kind of laws binding on Americans who are fishing in British waters; for if that contention be just, the Treaty waters must be delivered over to anarchy." "

The same immunity from British laws has been more recently asserted by Mr. Secretary Root in 1906: "Great Britain has asserted a claim of right to regulate the action of American fishermen in the Treaty waters, upon the ground that these waters are within the territorial jurisdiction of the Colony of Newfoundland. This Government is constrained to repeat emphatically its dissent from any such view. An appeal to the general jurisdiction of Great Britain over the territory is, therefore, a complete begging of the question, which always must be, not whether the jurisdiction of the colony authorizes a law limiting the exercise of the Treaty right, but whether the terms of the grant authorize it." "

In making this broad statement, the Secretary of State appears to be unacquainted with the doctrines of British law which govern all parts of the Empire. It is a doctrine of that law,—affirmed many years ago by the Judicial Committee of the Privy Council, and in later years by the Imperial Parliament,—that, under the British system of Constitutional Government, a Treaty between Great Britain and a Foreign Power which provides for the exclusion of such territory from the British jurisdiction and laws, theretofore established therein; or for the application of any extraordinary, or foreign, jurisdiction over foreigners, or former subjects, within such territory, can only become legally operative therein in the time of peace, when specially confirmed by an Act of the Imperial Parliament." "

" Ibid., p. 323.

" Correspondence respecting the Newfoundland Fisheries (Imp.), 1906, p. 13.

" *Damhodar Gordhan v. Deoram Kanzi* (1875-6), 1 Appeal Cases, 332; the Anglo-German Agreement Act (Heligoland), 1890 (Imp.), c. 32; and the Anglo-French Convention Act (Africa and Newfoundland), 1904 (Imp.), c. 33.

In asserting this repudiation of the binding force of British and Colonial Laws on American fishermen exercising the privilege of fishing within British jurisdiction, Mr. Secretary Root also negatives the prior acknowledgments of the American Government made through Mr. Secretary Marcy in 1856, Mr. Secretary Boutwell in 1870, and Mr. Secretary Bayard in 1886, that "the fishermen of the United States are bound to respect the British laws for the regulation and preservation of the fisheries, to the same extent to which they are applicable to British and Canadian fishermen."^a

The disturbing misuse of the Treaty privileges of fishing, and the frequent repudiation of British and Colonial Laws, violate a doctrine of International Law long recognized and enforced by the United States: "Aliens while within our jurisdiction, and enjoying the protection of our laws, are bound to obedience to them, and to avoid disturbances of our peace within, or acts which would compromise it without, equally as citizens are."^a

And the British doctrine concurs: "Every individual on entering a foreign country, binds himself by a tacit contract to obey the laws enacted in it for the maintenance of the good order and tranquillity of the realm."^a

And now that the questions affecting these gratuitous fishery privileges to American fishermen are about to be submitted to the Hague Tribunal, it is hoped by the Colonial subjects of the Crown who are to be affected by its decision, that Great Britain will raise for discussion or adjudication, the claim of an inherent prerogative revocation-power, similar to that exercised by the United States, as illustrated by the precedents cited in this article, so as to enable her to relieve her colonies from the coast burthen, or any future misuse, of these gratuitous fishery privileges; and from repetitions of the disturbing misuse, and

^a Foreign Relations (U.S.), 1870, p. 411; 1880, p. 572; 1886, p. 377.

^a Moore's Digest of International Law of the United States, vol. 4, p. 10.

^a Phillimore's International Law (3rd ed.), vol. 1, p. 454.

aggressive claims, which have caused so much international friction between herself and her colonies, and between them and the United States, in past years. For it should be seriously and nationally realized by Great Britain that the fish-wealth of these Colonial coast-waters is the natural property of the Colonial subjects of the Crown, as part of their food supply, and also as being valuable to them as one of their commercial assets for Colonial trade and revenue purposes.

The doctrines of *jus inter gentes* as to national territorial sovereignty, which appear to govern the decision of this question; the experience of disturbing misuse; of international friction and breaches of local law; the repudiation of British and Colonial Laws, thereby "delivering the Treaty waters over to anarchy," and the consequent urgent necessity for the relief of her Colonial subjects, aided by the supporting force of the American precedents given above, should guide Great Britain in presenting their case before the Hague Tribunal, and in seeking to have those precedents authoritatively recognized as formulating a universal doctrine of International Law applicable to the class of Treaties which concede to the alien-subjects of another sovereignty a share in the commercial privileges or national rights of property of the home-subjects of the conceding sovereignty.

THOMAS HODGINS.

LAW REFORM.

As there have been many discussions lately upon the above subject, I ask the consideration of your readers to some suggestions which perhaps have more than once been made, but which may bear repetition.

It has occurred to me that this expression has been made to cover, during the existing discussion, not so much any broad or general scheme of improvement, such as was involved in the consideration of the Common Law Procedure Act, the Administration of Justice Act or the Judicature Act, but rather a considera-

tion of one aspect of the matter, namely, the cheapening of litigation and that (so far as the Government proposals are chiefly concerned) by reducing and regulating the number of appeals.

It will be observed that out of eleven items appearing in the Attorney-General's resolution, seven deal exclusively with appeals while one (that of examination for discovery) deals with a minor matter of practice under the rules which has already been considered by the judges and upon which they have full power to legislate.

On the question of appeals, there are no data so far as I know, to shew what injustice now exists or how far it can be remedied. We have in Ontario at present two sets of Appellate Courts: the first, being the Divisional Court in which appeals are cheaply and very economically disposed of; and it seems difficult to believe that the procedure could be altered so as to make an appeal to this forum cheaper or more expeditious unless the Government would abolish the stamps and fees for the evidence at present paid and would furnish the evidence for nothing. If this were done the litigant would have his appeal for almost nothing, except a counsel fee on the argument and in most cases such counsel fee between party and party is not more than \$40 or \$50. If reform at present means cheapening litigation and if that is desirable, I respectfully suggest the introduction of some legislation looking to the abolition of stenographers' fees for evidence, so that the Government would pay its stenographers as it does its other officials.

Then as to the Court of Appeal. This forum furnishes an opportunity to litigants to present their more important cases to a court which is equipped for considering and has the time to devote to the patient consideration of larger matters. There are again no exact data to enable us to say what proportion of cases it hears and what the cost of such litigation is. Three items make up almost the whole of the expense attendant on such appeals: (1) the evidence, (2) the printing, (3) the counsel fee. The first would disappear if the country would pay its cost; the

second is almost essential to the due consideration of important matters, but its cost might be much lessened by a stricter scrutiny of what goes into the appeal book, and by the Government arranging to contract for all printing at a specified rate so that every appellant might get the benefit of the Government's terms and have his work done for a specified sum per page by some officially appointed printer. Such a course would ensure uniformity in the work, would permit the transfer of the proof-reading from the law offices to the printers at probably a great saving of expense and would greatly improve the appearance of the book. As for the counsel fee, that is a matter that scarcely permits of regulation except on taxation between party and party, because a man will pay all he can afford for the services of the man who, in his opinion, can best argue his case for him.

It must be remembered that this question of appeals has been frequently considered and many changes made from time to time and it may be doubtful whether the system of appeals can now be much improved upon.

In reference to appeals to the Judicial Committee of the Privy Council, it might be worth while to ask that body to accept as the record in the appeal the printed appeal book already prepared for the lower courts, with such slight additions as are necessary to bring the proceedings to date. There seems to be no valid reason why proceedings should be reprinted merely because the Rules of the Judicial Committee differ from those in Ontario as to the appearance of the record.

The real hardship in litigation lies in the protracted and unnecessary proceedings indulged in before a trial is reached. It should not be necessary to incur much expense or have much delay in getting to trial in most cases, and many practitioners, including the best lawyers in the country, rarely, if ever, launch an interlocutory motion. In most cases a short statement of claim setting out the nature of the claim in law with its attendant facts, a short reply on the law and facts, a notice to produce documents (which might readily be incorporated in the pleadings) an inspection of those documents before examination for

discovery and an examination for discovery limited to one hour, are all that is required and the limitation of time for examination might be readily achieved by prohibiting without an order of the judge at the trial, the recovery of any fee on examination, even from the client, for any greater length of time except under special circumstances. In this way, and with the abolition of stamps, the cost of litigation could be very greatly lessened and the necessary flexibility could be given to proceedings by reserving power to apply to a judge for directions where more might be required. After all, the conscientious lawyer rarely requires to take more steps now than those here outlined and whatever other steps the Rules compel him to take he generally looks upon as mere surplusage.

The expense of a trial also could be much lessened by some legislative recognition of the fact that a case is best handled where the evidence is rapidly brought out, where cross-examinations are generally short, and where but little time is spent in the discussion of minute questions of procedure arising during the trial. At the trial one of the greatest expenses is frequently the payment of expert witnesses. Such witnesses are sought for their eminence in their calling. Their time being valuable they naturally demand large fees; their evidence being technical, much time is taken up in examining and cross-examining them, and their special knowledge frequently serves rather to confuse the court or the jury than to assist it or them. It would probably be much cheaper and more satisfactory if each party should, if possible, agree on and nominate one expert to assist the court in technical matters, who would occupy rather the position of an assessor than a witness, and who, giving his statement judicially, would not require the lengthy confusing examination and cross-examination that is now such a prominent feature of our trials. Even if the parties could not agree on an expert they might submit names to the trial judge who could make his choice from the two lists furnished him.

There is one other important matter connected with litigation which, while fortunately most usual in the profession, has received little, if any, legislative or judicial consideration. I

refer to the subject of settlements. There is probably scarcely an exception to the general rule that no matter what sacrifices he makes each party to a dispute is better off for having early in the proceedings effected a compromise. If, by teaching in the Law School—by the allowance of somewhat more liberal fees for making settlements—by the judges offering facilities for the friendly discussion before them of disputed points, or by any other means, the desirability and usefulness of settlements could be enforced or demonstrated, a long step would be taken in removing hardship or scandal from litigation. In many law suits, especially over estates or between relatives or former friends, the feelings of the litigants and even of their respective advocates are so strongly enlisted for their own views that success becomes desirable more for the sake of victory than for any substantial advantage to be derived, and, if legislation could be enacted which would permit the intervention of some independent third person rather as mediator than as judge, it might serve to remove from our courts a class of cases which probably gives rise to most of the criticism we hear, namely, lawsuits where the costs exceed by many times the amount in dispute.

While not aware of the extent to which this subject is discussed in the Law School, one can hardly think of any place where the methods of making a settlement could be more usefully examined. The qualities required are so largely ethical, such as fairness, conscience, good feeling, good temper and common sense, that without departing from the existing curriculum, time might well be employed in pointing out and ascertaining general classes of cases in which settlements are particularly desirable or attainable.

SHIRLEY DENISON.

UNIFORMITY OF DECISION.

The Ontario Legislature as is well known made an attempt to compel judges to follow the decisions of courts of higher or co-ordinate jurisdiction: see Ont. Jud. Act, s. 81. This provision was no doubt legislatively intended to do away with the

embarrassment arising from their being conflicting decisions on the same question; but in this matter like many others, a well-known maxim may be applied with a variation, "the Legislature propose, but the judges dispose."

We have an illustration in a recent case of the utter futility of such legislation. In some of the recent local option by-law cases, as is well known, attempts have been made to question the finality of the voters' lists as regards the qualification of voters. *In re Cleary v. Nepean*, 14 O.L.R. 392, Mabee, J., determined that the lists were not conclusive as to the right of a person named therein to vote; but *In re Mitchell v. Campbellford*, 16 O.L.R. 578, Clute, J., came to the conclusion that prior decisions to that of Mabee, J., had determined that the voters' list was final and conclusive as to the right of a voter named therein to vote and he therefore refused to follow Mabee, J.

The section of the Judicature Act above referred to seems to be violated, and yet how is it to be worked out? If a judge disregards prior decisions he is violating the statute. Is it intended that if he does so, all subsequent cases must be decided according to his view? or is the remedy that the point of law in question should be referred in any subsequent case where the prior decision is regarded as erroneous to a Court of Appeal in order that such prior decision may be formally reversed? We are rather inclined to think that this is the procedure the statute contemplates and not that each judge is to assume the right "not to follow" a prior decision of a judge of co-ordinate jurisdiction because he happens to think it erroneous. It may be said that in order to do so he would still have to violate the statute whatever course he took wherever there were prior conflicting decisions; but what the Legislature was aiming at was the doing away with conflicting decisions of judges of co-ordinate jurisdiction, which leaves the law in a state of uncertainty, by enabling a judge whenever that state of things exists before him, to refer the case to a higher tribunal so that the point in question may be definitely settled, and not left as a sort of battledore and shuttlecock game in which one judge may follow A. and another follow B. according to his personal predilection.

This would seem to have been what the Legislature was trying to accomplish, but like some other legislative experiments, it seems to have been a failure.

The article which began our number for September was written for the purpose of drawing attention to what the writer considered a weak spot in our constitution, and which, it was thought, might be amended. Whether such a change as there suggested would be beneficial is a matter of opinion; but, as to the law as laid down by the Privy Council as well as in this country and emphasized in the judgment spoken of, there is no question. The learned judge whose language we quoted simply expressed in his own terse way how that law stands (see ante pp. 499, 553). The remarks of the writer of the article do not question the accuracy of his judgment, which is constitutionally correct, but draw attention to the position thus graphically portrayed, and enlarge upon the difficulty of the situation, and suggest a possible remedy; a remedy, which, by the way, could only be had by legislation and that of a character necessarily very difficult to obtain, as it would involve an amendment of the B.N.A. Act. It may be that the remark of the learned judge which has caused this discussion might, by its very terseness, and taken by itself, lead to an inference which the context shews is not warranted. It may also be noticed that he guards himself from any inference that in this particular case the legislature had violated the moral law.

A paragraph recently appeared in the daily papers to the effect that the driver of an automobile had only a second to choose between killing a young girl and a street labourer, and that he chose to kill the man. The thought in the mind of the writer of the paragraph seemed to be that much credit was due to the driver in the choice of the person whom he should murder. He had no comment whatever on his statement that the chauffeur was driving a wealthy New Yorker through the centre of the

City of Worcester, Mass., at the rate of 25 miles an hour. Whether he was going at that rate to please the fancy of his master for great speed, or with the recklessness of his class, does not appear. Are we going back to the brutal days of the gladiatorial exhibitions in the Coliseum where men and women gloated over the sight of the blood of innocent victims? Whilst we object to lynch law there are undeniably cases where nothing else seems possible as a preventive. The outraged feelings of the public would scarcely be shocked by seeing the millionaire and his chauffeur dangling from the nearest lamp-post.

The blue laws of Connecticut seem still to be in evidence if a paragraph from a newspaper there is to be credited. A man insisted on kissing his wife dramatically on a trolley car, but was stopped on the road and arrested under an old blue law that says that a man must not kiss even his wife in a public place. The judge not being clear as to whether these laws were still in force simply fined him for disorderly conduct. May we be allowed to rejoice that in a country where divorce is so common there was even this boisterous exhibition of conjugal affection. If we remember correctly the attention of the public was drawn to the horrors of the old English law which provided hanging for theft, etc., by a judge passing sentence of death on one found guilty of that offence. These laws were immediately repealed. The fine made by the magistrate in the above case may possibly result in appropriate legislation in New England.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] C. BECK MANUFACTURING CO. v. VALIN. [Oct. 6.

Mandamus—Lumber driving—Order to fix tolls—Past user of stream—Appeal—R.S.O. (1897) c. 142, s. 13.

By R.S.O. (1897) c. 142, s. 13, the owner of improvements in a river or stream used for floating down logs may obtain from a district judge an order fixing the tolls to be paid by other parties using such improvements. On application for a writ of mandamus to compel the judge to make such an order,

Held, affirming the judgment of the Court of Appeal (16 O.L.R. 21) DAVIES, J., dubitante, and IDINGTON, J., expressing no opinion, that such an order had effect only in case of logs floated down the river or stream after it was made.

Held, per IDINGTON, J., as s. 15 gives the applicant for the order an appeal from the judge's refusal to make it mandamus will not lie.

Held, per DUFF, J.—The mandamus could issue if the judge had jurisdiction to make the order though he refused to do so in the belief that a prior decision of a Divisional Court was res judicata as to his power.

Appeal dismissed with costs.

Bicknell, K.C., for appellants. *Shepley*, K.C., and *A. G. F. Lawrence*, for respondents.

N.B.] ABBOTT v. ST. JOHN. [Oct. 6.

Constitutional law—Municipal taxation—Official of Dominion Government—Taxation on income.

Sub-s. 2 of s. 92 B. N. A. Act 1867, giving a provincial legislature exclusive powers of legislation in respect to "direct taxation within the provinces, etc.," is not in conflict with sub-s. 8, of s. 91, which provides that Parliament shall have exclusive

legislative authority over "the fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada." *GIROUARD, J.*, contra.

Held, therefore, *GIROUARD, J.*, dissenting, that a civil or other officer of the Government of Canada may be lawfully taxed in respect to his income as such by the municipality in which he resides. Appeal dismissed with costs.

Powell, K.C., for appellant. *Skinner, K.C.*, for respondent.

N.S.]

[Oct. 6.

UNION BANK OF HALIFAX *v.* INDIAN & GENERAL INVESTMENT TRUST.

Pleading—Purchase for value without notice—Onus—Evidence—Affirmative and negative—Telephone conversation.

The plea of purchase for value without notice must be proved in its entirety by the party offering it; it is not incumbent on the opposite party to prove notice after the purchase for value is established.

Where a conversation over the telephone was relied on as proof of notice the evidence of the party asserting that it took place and giving the substance of it in detail must prevail over that of the other party who states only that he does not recollect it.

Appeal dismissed with costs.

W. B. A. Ritchie, K.C., for appellants. *Newcombe, K.C.*, and *J. J. Ritchie, K.C.*, for respondents.

Province of Ontario.

COURT OF APPEAL.

Full Court.]

REX *v.* BROWN.

[Sept. 29.

Criminal law—Unlawfully solemnizing marriage—Minister of independent congregation—Qualification—Appointment—Ordination—Appeal within s. 1017 of Cr. Code—Jurisdiction.

Certain persons met and professed to form themselves into an independent church or congregation known as "The First

Chinese Christian Church, Toronto," and appointed the defendant, one of their number, the minister of the church. At a subsequent meeting he was ordained by two Congregationalist ministers, not as a Congregationalist minister, but as a minister of a new independent church.

Held, that he was not a minister ordained or appointed according to the rites and ceremonies of the church or denomination to which he belonged, within the meaning of R.S.O. 1897, c. 162, s. 2, sub-s. 1; and, the above facts appearing upon his indictment and trial for solemnizing or pretending to solemnize a marriage without lawful authority, contrary to s. 311 of the Criminal Code, there was evidence upon which he could be convicted, and his conviction was affirmed.

Per MOSS, C.J.O., that where the judge at the trial states a case for the opinion of the Court of Appeal, the case comes before that court as an appeal, within the meaning of s. 1017 of the Code, and the court has the right to refer to the evidence, even when it is not made a part of the case.

Per MEREDITH, J.A., that the Court of Appeal had no jurisdiction to entertain the case, the questions reserved for the opinion of the court being questions of fact.

A. R. Hassard, for the defendant. *J. R. Cartwright*, K.C., for the Crown.

Full Court.]

REX v. YALDON.

[Sept. 29.

Criminal law—Perjury—Indictment—Intent to deceive—Crim. Code, s. 852—Lord's Day Act—C.S.U.C. c. 104, s. 3—Perjury in Police Court—Jurisdiction of magistrate—Absence of information—Judicial proceeding—Crim. Code, s. 171—Evidence—Record of trial.

The indictment contained in substance a statement that the accused committed the indictable offence of perjury in a judicial proceeding.

Held, 1. It complied with the requirements of s. 852 of the Criminal Code, and was not bad because it did not allege that the accused committed perjury with intent to deceive.

2. The statute C.S.U.C. c. 104, s. 3, is in force in Ontario. *Attorney-General for Ontario v. Hamilton Street R.W. Co.* [1903] A.C. 524 followed.

The accused was arrested by a police constable, and brought before a police magistrate, when a charge of gambling with dice

on the Lord's Day was laid against him. So far as appeared, no information was laid, but the constable had a warrant, which he read to the accused. The latter made no objection to the manner in which he had been brought before the magistrate or in which the charge had been laid; his trial was proceeded with, and in testifying on his own behalf he committed the perjuries for which he was indicted.

Held, 1. The magistrate had jurisdiction, and the accused gave his evidence in a judicial proceeding, within the meaning of s. 171 of the Code.

2. There being no information or other formal record, the charge and the proceedings thereon, so far as material, were proved in the only way in which they were capable of being proved, i.e., by the oral evidence of the magistrate and his clerk, each speaking with the aid of his notes taken at the trial, which was the best evidence possible in the circumstances, and therefore sufficient.

Rex v. Drummond (1905) 10 O.L.R. 546 distinguished.

G. Lynch-Staunton, K.C., and *M. J. O'Rielly*, K.C., for the accused. *J. R. Cartwright*, K.C., and *S. F. Washington*, K.C., for the Crown.

HIGH COURT OF JUSTICE.

Boyd, C., McGee, J., Riddell, J.]

[Sept. 28.]

BRADLEY v. MCCLURE.

Landlord and tenant—Lease of farm for "pasturing purposes"
—Tenant selling hay raised on farm—Injunction.

This was an appeal from the judgment of ANGLIN, J. The defendant rented a farm from the plaintiff. Part of the land was cleared, part seeded down, and the rest brush and swamp. The only stipulation in the lease as to the use of the place was contained in the words "for pasturing purposes." The defendant pastured sheep and cattle over the whole place the first winter and during the fall. The next spring he fenced off about 67 acres on which he allowed hay to grow, the cattle feeding on the rest of the farm. On taking the lease he bought 40 tons of hay from the plaintiff, which he fed on the place during the first winter. He began to cut the hay on the part seeded down in

July, and placed it in the barn expecting to winter his stock with part of the produce, and to sell part.

Held, 1. The defendant was properly enjoined from selling and allowing the removal from the place of any part of the hay, following *Crosse v. Ducker* (1873) 37 L.T.N.S. 816.

2. The meaning of the lease was that all herbage was to be used and consumed on the premises and that it was immaterial whether part of the hay was removed from one part of the farm to another so far as damages were concerned, following *Westropp v. Elligott*, 9 App. Cas. 815.

F. W. Wilson, for defendants. *R. McKay*, for plaintiff.

Province of Nova Scotia.

SUPREME COURT.

Longley, J.]

HOBRECKER v. SANDERS.

[Sept. 29.]

Judgment—Application under O. XIV.—Effect of pleading.

Plaintiff applied by summons for leave to enter final judgment under the provisions of O. XIV. in a case where the defendant had appeared to a summons specially indorsed under O. III. r. 5. After the issue of the summons for judgment defendant filed and served pleas.

Held, that the court could not interfere with the pleas so pleaded on the faith of the affidavit made by plaintiff previously to the filing of the pleas.

Quære, whether the court had power to enlarge the time to enable plaintiff to furnish further sworn statements.

W. B. A. Ritchie, K.C., and *Terrell*, for plaintiff. *Mellish*, K.C., for defendant.

Drysdale, J.]

RE DYAS.

[Oct. 2.]

Physician and surgeon—Registration obtained by means of false certificates—Power of Medical Board to revoke.

Appellant obtained registration as a physician and surgeon in the Province of Nova Scotia on the presentation of certificates

showing pass marks in various subjects covering a three years' course at a medical school in the United States, and similar certificates shewing pass marks in subjects covering a one year's course in another institution. On complaint made to the Medical Board that the registration in question was obtained by means of false certificates an investigation was held which resulted in the passing of a resolution striking appellant's name from the register. On appeal,

Held, that the Medical Board had power, after proper enquiry, to pass the resolution they did, and that as their finding was supported by the evidence produced upon the enquiry the appeal must be dismissed.

J. J. Ritchie, K.C., for appellant. *W. B. A. Ritchie*, K.C., for respondents.

Longley, J.] SAM CHAK v. CAMPBELL. [Oct. 5.

Summons—Incorrect address of plaintiff—Stay ordered—Costs.

Where a writ of summons was issued by plaintiff, through his solicitor, against defendant, and the address given as that of plaintiff was shewn to the satisfaction of the court to be untrue, and a stay was ordered until the right address was furnished, and the defendant subsequently, in pretended compliance with the order of the court, furnished addresses which were found to be incorrect, the court refused, on motion for that purpose, to set aside the writ, but ordered a further stay until an address was given in strict compliance with the Act and ordered the costs of the application to be paid by plaintiff.

Macilreath, in support of motion. *O'Connor*, contra.

Drysdale, J.] A. v. B. [Oct. 6.

Patent—Patentable improvement—Infringement—Damages.

Plaintiffs claimed an injunction to prevent defendant from infringing a patent obtained by plaintiffs for an improvement in the manufacture of caps, and damages for the infringement complained of. The patent related to a flexible elastic material attached to the interior of the cap which, when turned outward and downward, afforded an efficient and comfortable covering for the ears without changing the proper fit of the cap.

Held, that the improvement referred to was a patentable one, and that plaintiffs were entitled to the injunction claimed and to an accounting in respect to damages.

J. J. Ritchie, K.C., and *W. B. A. Ritchie*, K.C., for plaintiffs.
Mellish, K.C., and *Bill*, for defendant.

Drysdale, J.] *R. v. DUTTON—RE WOO JIN.* [Oct. 7.

Chinese Immigration Act—Deportation of person violating provisions—Powers of minister.

On the argument of the return to a habeas corpus for the release of Woo Jin, a person of Chinese origin, who was being deported from Canada by the steamship "Bornu," on account of an alleged violation of the Chinese Immigration Act.

Held, that under the provisions of the Act, as amended by Acts of 1908, c. 14, the courts are not charged with any duty or authority in the matter, but, by s. 27*a* of the Act, the Minister is authorized to apprehend and deport. The Minister seems to be charged with the responsibility not only of the deportation, but of ascertaining the liability of the person to deportation and it is not necessary that he should have first caused the person to be indicted and secured a conviction for a violation of the Act.

O'Connor, for the prisoner. *Fulton*, for the steamship.

Longley, J.] *R. C. E. CORPORATION v. MACPHERSON.* [Oct. 9.

Venue—Motion for change refused—Grounds—Costs.

Where a motion for change of venue was made on the ground that some fifteen necessary and material witnesses for defendant resided, at S., but the application was not made until a few days before the date of the opening of the court at A., where the cause was set down for trial, and the effect of granting the application might be to postpone the trial indefinitely. And where it was shewn on the part of plaintiff that under the circumstances of the case knowledge of the matters in issue must be largely confined to the two contending parties, and that a number of the witnesses named by defendant could have no knowledge of the matter, the application was refused, costs to

be plaintiff's costs in the cause, plaintiff to be subject to an undertaking to pay extra costs, not exceeding a fixed amount, due to the holding of the trial at A.

Robertson, in support of motion. *Mellish*, K.C., contra.

Longley, J.]

SMILEY v. CURRIE.

[Oct. 12.

Execution—Omission in recital—Action against sheriff for escape—Damages.

An execution which, in the preamble, recites the recovery of a judgment against . . . , and then proceeds, in the directory part to require the sheriff "to take the body of the said B. and commit unto our jail, in your bailiwick, etc.," is ample authority notwithstanding the omission of the name of the judgment debtor from the preamble, to justify the sheriff in holding him under the execution, and where the sheriff upon his own responsibility, though acting in good faith, under the impression that the execution is bad for the reason stated, allows the debtor to go, he will be liable to the execution creditor in damages as for an escape.

Where it appears from the evidence that the debtor is not a person of substance, and on account of his financial position is not likely to be in a position to pay, damages will be assessed accordingly.

Graham, for plaintiff. *W. C. Robinson*, for defendant.

Province of Manitoba.

KING'S BENCH.

Mathers, J.]

[Sept. 21.

TIMMONS v. NATIONAL LIFE INS. CO.

Practice—Examination for discovery—Particulars—Action for libel.

Action for libel. The defendants pleaded that the libel complained of was a privileged communication and set up certain

circumstances creating it. The plaintiff applied for an order for particulars of the privilege. Defendants, while not denying the plaintiff's right to the order, claimed the right to examine the plaintiff for discovery before furnishing particulars.

Held, following *Zerenberg v. Labouchere* (1893) 2 Q.B. 183, and *Beaton v. The Globe*, 16 P.R. 281, that, in an action for libel, the defendant has not the right claimed in this case.

Appeals from orders of the Deputy Referee, postponing the application for particulars until after the examination of the plaintiff for discovery and that the plaintiff should attend for such examination at his own expense, allowed with costs.

Deacon, for plaintiff. *Robson*, for defendant.

Mathers, J.]

FOLEY v. BUCHANAN.

[Sept. 21.

Practice—Examination for discovery—Service of copy of appointment instead of original.

The plaintiff's solicitor, desiring to examine the defendant for discovery, served upon his solicitor a copy of the examiner's appointment, relying on sub-rule (1) of Rule 391a, added to the King's Bench Act, R.S.M. 1902, c. 40, by 5 & 6 Edw. VII. c. 17, s. 2, and, upon defendant failing to attend on the appointment, obtained an order from the Deputy Referee directing the defendant to attend for examination at his own expense.

Held, on appeal from this order, that, as the sub-rule speaks of the service of an appointment upon the solicitor, service of a copy only of the appointment was not sufficient, without service also of a subpoena on the defendant personally under Rule 389, and that the order should be set aside with costs.

Myers v. Kendrick, 9 P.R. 363, followed.

Burbidge, for plaintiff. *Deacon*, for defendant.

Cameron, J.]

BROUGH v. MCCLELLAND.

[Sept. 25.

Action—Covenant of indemnity—Assignment of—Sale subject to unpaid purchase money—Liability of sub-purchaser—Implied contract.

One Galbraith agreed in writing to purchase certain lands from the plaintiff and paid \$200 on account of the purchase

money. He afterwards transferred his interest in the lands under the agreement to the defendant by an assignment indorsed thereon signed by himself, but not by the defendant. The defendant did not make any of the payments remaining due to the plaintiff under the agreement and Galbraith then assigned to the plaintiff "all and every covenant, agreement and obligation of the said A. B. McClelland of any and every nature and kind whatsoever, whether expressed in the assignment hereinbefore mentioned to the said McClelland or implied from any or all of the transactions between them and also all obligations both legal and equitable" of the defendant.

Held, that, upon plaintiff adding Galbraith as a party defendant with his consent, for which leave was given, the plaintiff was entitled under the assignment from Galbraith to him to recover from the defendant the amount remaining due under the original argument of sale to Galbraith.

Maloney v. Campbell, 28 S.C.R. 228, and *Cullen v. Rinn*, 5 M.R. 8, followed.

Hull and McAllister, for plaintiff. *Higgins*, for defendant.

Province of British Columbia.

SUPREME COURT.

Martin, J.]

[Sept. 23.

DARNLEY v. CANADIAN PACIFIC RY. CO.

Master and servant—Employment obtained by misrepresentation
—"*Serious and wilful misconduct as serious neglect*"—*Release signed by infant*.

The making of a false representation by an infant to the effect that he is of full age in order to secure employment is not such "serious and wilful misconduct or serious neglect" as disentitles the applicant to recover under the Workmen's Compensation Act, 2 Edw. VII. c. 74, it not appearing that the accident in question was "attributable solely" to the circumstance of such misrepresentation having been made.

A release signed by the infant while still of non-age held not a bar to his recovering, the infant having returned the advantage derived.

W. S. Deacon, for the applicant. McMullen, for defendants.

Book Reviews.

Company Law. By W. R. PERCIVAL PARKER, B.A., LL.B., and GEORGE M. CLARK, B.A., LL.B., Barristers-at-law. Toronto: Canada Law Book Company, Limited. Philadelphia: Cromarty Law Book Company. 1908. 683 pages.

The rapid commercial growth of Canada requires increasingly the formation of limited companies, and as a consequence company law has become one of the most important branches with which the practitioner has to deal. This work is a concise manual of the law and practice connected with the organization, management and winding up of companies. The authors have treated the subject consecutively from incorporation to winding up, and have dealt with each title clearly and exhaustively. Useful forms are appended to each chapter. Whilst the author says that "theoretical discussions have been avoided as far as possible," there are very useful collections of cases, carefully arranged. The index appears to have received special attention, and the printing and binding of the volume are excellent.

The Law of Tender. By GEORGE LUCAS BEYNON HARRIS, Barrister-at-law. London: Butterworth & Co., 11 and 12 Bell Yard, Temple Bar, Law Publishers.

No more enticing book to a lawyer has been written for many years. The reason for its appearance was the felt want in some important suit of an exclusive and exhaustive work upon the subject; a subject, which, for its proper understanding, needed an extensive research into the black letter sources of the doctrine of tender. The author is evidently a writer of much literary ability as well as one who dug deep into the mine of legal lore for the information which was appropriate to his subject; and he has set it forth with great clearness and aptness of ex-

pression. Whilst he speaks of tender as "one of the radiant gems of elementary justice drawn from the rude primordial judicature of barbarism," he gives us something more definite in his definition of it: "An unqualified voluntary offer of continuing readiness on the part, or on behalf of, an obligor to perform a definite obligation, duty or act of reparation, accompanied by production of the means of fulfilling the offer, made with the object of protecting the person making it against demands, penalties or other consequences in excess of the offer, the actual performance being prevented by the refusal of the other party to accept the same." A much more complete and satisfactory definition than any we have come across elsewhere.

The author adopts the following method of sectional concentration and arrangement, which seem convenient both for the practitioner for every day reference, as to a reader who simply desires a good bird's-eye view of the subject. Part 1. Tender on contracts of debt. Part 2. Tender of amends. Part 3. Tender on contracts of sale. Part 4. Tender on conduct money. Part 5. Tender of evidence, of vadium, to a pawnee, where lien claimed, of vote at election, etc. The mechanical execution by both printer and publisher is of the highest merit.

A Digest of the Law of England, with Reference to the Conflict of Laws. By A. V. DICEY, K.C., Vinerian Professor of English Law in the University of Oxford. Second edition. London: Stevens and Sons, Limited, Chancery Lane; Sweet & Maxwell, Limited, Chancery Lane. Toronto: Canada Law Book Company, Limited. Philadelphia: Cromarty Law Book Company. 1908. 883 pages.

This standard work was first published about twelve years ago, and the new edition brings it up to date. The book, while a masterpiece of learning and research, is not a theoretical treatise but rather an eminently practical handbook on the subject of private international law. Among the titles dealt with are the jurisdiction of foreign courts in matters of divorce, the effect of foreign judgments, the effect of foreign bankruptcy, the effect of foreign grant of administration and the validity of contracts made or to be performed in a foreign country.

The Law of Copyright and Designs with the Practice Relating to Proceedings in the Courts Under the Various Acts and Rules with Full Appendix of Statutory Forms and Precedents. Second edition. By EDMUNDS and BENTWICH. London: Sweet & Maxwell, 3 Chancery Lane. 1908.

The reason for this edition is the necessity for a re-statement of the English Law of Designs owing to the recent passing of the Patents and Designs Act which has consolidated various statutory divisions previously in force. As the number of designs registered in England last year was over 26,000, one can easily imagine that there was need to give to the many parties interested all available assistance.

Law Reports Annotated. N. S. Rochester, N.Y.: Lawyers' Co-operative Publishing Co. 1908.

Of the making of reports there is no end. How learned we all should be, if we had the diligence of Lord Coke, and lived as long as Methuselah. This is a most excellent series of United States reports, issued with the promptitude and ability for which the company is noted. The digest of vols. 1 to 12 has also been received, giving a reference to and a digest of the cases appearing in these 12 volumes covering a period of the last two years.

United States Decisions.

The construction of a bridge approach in a public street in such a way as to destroy the access to abutting property and impound snow and water thereon is held, in *Ranson v. Sault Ste. Marie*, 143 Mich. 661, 107 N.W. 439, 15 L.R.A. (N.S.) 49, to be a taking for which compensation must be made. A note to this case collates the other authorities on cutting off access to a highway as a taking.

A real estate agent authorized by express contract to sell property at a certain price is held, in *Ball v. Dolan* (S.D.) 114 N.W. 998, 15 L.R.A. (N.S.) 272, to have no right to recover on a quantum meruit for the value of his services in finding a purchaser who pays less than that sum, where the owner receives no benefit from the agent's services, although the agent is present and assists in the sale, and the owner changes the price.

A street railway company is held, in *Riley v. Rhode Island Co.* (R.I.) 69 Atl. 338, 15 L.R.A. (N.S.) 523, not to be liable for injuries to a passenger who slips upon snow and ice accumulated during a storm upon a step after the car has started upon a trip.

A memorandum written on the back of a promissory note at the time of execution, which limits its consideration, affects its operation, and was intended to be a part of the contract, is held, in *Kurth v. Farmers' & M. State Bank* (Kan.) 94 Pac. 798, 15 L.R.A. (N.S.) 612, to be regarded as a substantive part of the note.

Flotsam and Jetsam.

One day Lord Cockburn went into the second division of the Court of Session, but came out again very hurriedly, meeting Lord Jeffrey at the door.

"Do you see any paleness about my face, Jeffrey?" asked Cockburn.

"No," replied Jeffrey; "I hope you're well enough."

"I don't know," said the other; "but I have heard Bolus (Lord Justice Clerk Boyle) say: 'I for one am of opinion that this case is founded on the fundamental basis of a quadrilateral contract, the four sides of which are agglutinated by adhesion!'"

"I think, Cockburn," said Jeffrey, "that you had better go home."

Lord Eskgrove is described by Lord Cockburn, in his "Memorials," as a most eccentric personage. Lord Cockburn heard him sentence a tailor for murdering a soldier, in these words: "And not only did you murder him where he was bereaved of his life, but you did thrust, or pierce, or push, or project, or propel the li-thall weapon through the belly-band of his regimental breeches, which were His Majesty's."

The Living Age. Boston, Mass. (Weekly).

There is no better way to keep in touch with the best thoughts of the best men in letters than to dip into the *Living Age*, with its selections from articles in the leading English journals and magazines. Its contents are refreshing in view of the mass of literary trash with which the Anglo-Saxon world is flooded.

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THE LAW AND THE MOTOR CAR.

Seldom have the British people been so stirred by any question of secondary importance as they have been by the evils resulting from motor traffic. The columns of such papers as the *Times* and *Spectator* are full of correspondence upon the subject, which is not only talked about, and written about, but also has been legislated about. Proceedings are taken in the police courts, an army of policemen are employed in regulating the traffic, fines are imposed, chauffeurs are sent to prison, heavy damages are exacted as the result of accidents, but still the agitation continues, and though the better class of motorists and motor owners, alive to the danger, are doing their best to avoid the evils complained of, more stringent legislation is threatened.

The danger to life and limb resulting from careless and reckless motor driving is the most serious feature of the case, but the damage to property is also a very grave matter. Day after day the papers record an appalling list of accidents, many of them fatal, and all of them serious. It frequently happens that the motorists—both drivers and passengers—are themselves the victims. Motor cars sometimes act like runaway horses; they get out of control, fall over embankments, dash themselves against banks of earth or walls of stone, against rocks, or trees or lamp-posts, and generally some one is killed, and others are dangerously injured. For such sympathy is coldly expressed, they know the danger and they take the chances. It is otherwise with the inoffensive foot passengers, or drivers of ordinary vehicles, who are such frequent sufferers. They are so helpless that they can only seek safety in flight, and let the aggressor rush triumphantly by. The damage to property, and the annoyance to passers-by and dwellers by the roadside, caused by the dust which invades the houses, has rendered some quarters almost

uninhabitable, besides being destructive to clothing. The smell, also, which follows in the track of the motor is equally objectionable. This is a serious indictment, and there is besides the humiliation to one's self-respect in the insolence of the motorist, as, with his resistless force, he compels you to get out of his way, looks in scorn upon your inferior power of movement, and glorifies in your inability to resist his violence, or punish his aggression. But the motorist is not content with proving his superiority in all these various ways. He destroys the roads which centuries of careful industry have created, and renders them unfit for the purpose for which they were made, and finally makes them useless for even his own enjoyment.

With such a condition of affairs the law and its myrmidons have so far vainly endeavoured to cope. It is admitted that, to use a common phrase, the motor car has come to stay, and all that can be done is so to regulate it as to reduce as far as possible the evils which it causes. As a matter of necessity the owners and users of motor cars must be people of wealth who will not be deterred by the imposition of a fine from any indulgence in the use of their motors, any more than they will be from a sense of the dangers and annoyances they cause to others.

The main object of legislation both in England and this country has been to regulate speed so as to avoid the dangers arising from too great rapidity of motion. There are two principles upon which this may be accomplished—one is by fixing a maximum rate not to be exceeded under any circumstances, and reduced in certain places, where the condition of the roads or streets require extra precaution. Judging from the reports in the English papers this method is not found to be satisfactory. When the motorist sees a clear road before him he will not be restrained by fear of the police who are watching for him, or by dread of a fine, from trying the speed of his machine, and enjoying the delight of rapidity of motion which is to many people a most exhilarating sensation. At the same time he feels justified in going as fast as the law will allow him, even when the speed permitted is too great for the safety of the public.

The other rule, which has many advocates, is to do away with the speed limit, or largely increase it, except in towns and villages, and to hold the motorist responsible for any damage that may occur. Thus when the motorist saw a clear road before him he would be at liberty to take advantage of it, knowing the risk that he was taking in case of accidents.

In England more stringent regulation than now exists is demanded, and, no doubt, will be granted, unless, under the pressure of public opinion, the motorists shew as much diligence in obeying the law as they have hitherto done in disobeying or evading it, and as much care for the safety and welfare of others as they do for the indulgence of their own pleasure.

In Canada it is chiefly in the country that trouble with the automobiles has arisen. In towns the traffic in the streets is not so great as in the old country, and the number of motor cars is relatively less. Here in country districts there is practically no redress for accidents caused by the carelessness or recklessness of the motorist. He may have the regulation number on his car, but the man who is driving a frightened horse, with perhaps women and children in his charge, has no time to look at the number of the car which has flashed by him, and even if he could make it out (almost an impossibility at any time), there are no police to whom he can look for assistance, so that the number is of very little value. Consequently the motorist who cares nothing for the law, and as little for those whom he may have injured, may reckon on escaping responsibility for any damage he may have caused.

In the United States, where the same condition of things exists as in this country, many cases have been tried where owners of cars have sought to throw the responsibility for the act complained of on the chauffeur, an irresponsible person, as, for instance, where the latter borrowed his owner's car for his own pleasure, and, while so using it, by his negligence ran a man down. In a very recent case in the United States, *Cunningham v. Castle*, N.Y. Supreme Court, July, 1908, the court was divided as to the liability of the owner, but the judgment was

that he was not liable. The judge in giving his decision said: "It may be that it would be wise in the public interest that the responsibility for an accident caused by an automobile should be affixed to the owner irrespective of the person driving it, but the law does not so provide." A very able dissenting judgment was delivered, in which it was said that: "To my mind the element of consent to the use of the instrumentality is important and controlling in the present case. It had been the habit of the defendant to allow his chauffeur to use the automobile to go to his meals, presumably to save time and expense. On the night in question the chauffeur had taken the defendant to his apartments. It was a part of his remaining duty to take the machine to the garage, for it could not be left in the street or kept in an apartment house. The chauffeur requested permission to deviate from the direct route to the garage to go uptown on some business for himself. The defendant told him that he might do that, 'but to hurry back, only be gone a short while; come right back.' The testimony of the chauffeur is to the same effect, but a little more specific in that he says the defendant told him to be careful, and if anything happened to be sure and notify the defendant at once. The chauffeur was still in the pay of the defendant, and his duty was to properly care for the machine and to properly house it for the night. Even while he was gone on business of his own this duty remained with him, and he was being paid for the performance of that duty by the defendant. It does not seem to me that the chauffeur was emancipated during the trip, notwithstanding it was for his own pleasure. I concede that if the chauffeur had taken the machine without the consent of the master and contrary to his orders his act would then have been entirely outside the scope of his employment.

"I appreciate that the case is on the border line, but it seems to me that the chauffeur was engaged in the business of the master; and deviated from the direct course to house the machine by the master's express consent, and that therefore the relation of master and servant still continued, and that the court was justified in refusing to charge as requested, or, under the proofs,

to submit to the jury the question as to whether or not that relation had been severed."

Under the circumstances of this case we venture to think that the reasoning in the dissenting judgment might well have decided the case in favour of the plaintiff.

There are only, we believe, two cases in our own courts where the user of an automobile on the master's business was discussed. In *Smith v. Brenner*, tried at London, April 28th, in which Mr. Justice Riddell held that the defendant was liable because the driver had violated the ordinary rule of the road in not driving with reasonable attention to the rights of others rightfully upon the highway. He refused to give effect to the contention that the chauffeur was not at the time upon his master's business, and held that a chauffeur turning out of the direct route to procure a cigar did not render him as not being therein about his master's business, citing *Venables v. Smith*, 2 Q.B.D. 279. As to the liability of the owner the learned judge says: "If the owner placed the vehicle in the hands of a chauffeur or lent it to a friend, he is putting it into the power of servant or friend to manage it in a manner which may be dangerous, and he must assure himself of the capacity and prudence of servant and friend at his peril."

Mattei v. Gillies was also an Ontario case decided by a Divisional Court (16 O.L.R. 558). There was conflicting evidence as to the facts, but it was held that there was enough evidence to warrant the findings of the jury in the plaintiff's favour. *Venables v. Smith* was also referred to, quoting the language "that the chauffeur was on his way home, though he went in a somewhat roundabout way." The learned Chancellor adds to this sentence the words "in order to gratify his friends." He goes on to say, "The motor was entrusted to his general care: *Sleath v. Wilson* (1839) 9 C. & P. 607. Besides this I am inclined to hold that having regard to the provisions of the Act as to registration of the owner, the carrying of a number for the purpose of identification, and the permit granted on those conditions, as between the owner and the public, the chauffeur

or driver is to be regarded as the alter ego of the proprietor, and that the owner is liable for the driver's negligence in all cases where the use of the vehicle is with the sanction or permission of the proprietor. In driving the motor he is within the ostensible scope of his employment, and the liability will remain by virtue of the statute, and this even though the driver may be out on an errand of his own."

A consideration of the observations in the above cases, and having in view the exceptional risk which attaches to the use of motor cars, it might be well in the public interest that responsibility for accidents caused by these vehicles should always be affixed to the owner, irrespective of the person driving it, and that the law should be so amended as to make this quite clear.

The next matter of importance is that of contributory negligence on the part of the person injured. It is not likely that any court would give the benefit of any doubt to the defendant in such a case, but would construe it strictly in favour of the plaintiff. This is also the thought of the legislature, as expressed in s. 18, of 6 Edw. VII. c. 46, which provides that in such a case the onus of proof that the accident did not arise through negligence on the part of the motorist shall rest upon him.

As expressed by Lord Alverstone in a recent case: *Troughton v. Manning* (1905) 69 J.P. 297: "It has been more than once noticed that the idea prevails among some motor drivers that once they have sounded the horn they are justified in going at any rate of speed, and that people are bound to get out of their way; whereas the more salutary rule would be as recommended by the Considerate Drivers' League to assume that it is the business of the motorist and not the other man's to avoid danger." The rule must not, of course, be carried too far, but motorists must be made clearly to understand that there is no rule of the road in their favour and that every vehicle, and every person on the road, has as good a right to the use of it as they have. It goes without saying that they must not presume upon their power of inflicting injury or annoyance as giving them any right or privilege whatever. They are just as responsible, and are

bound to be just as careful as the driver of a horse is bound to be, and in fact should be more so in view of the greater force and momentum of their vehicles and the certainty of greater damage in case of a collision.

Whilst the usefulness of motor vehicles must be admitted it must also be admitted that their use has been more or less of a public nuisance for the reasons set forth in the commencement of this article and for others that might be added to that list. It is clear, therefore, that this user should be safe-guarded so far as the public is concerned in every possible way.

Another point to be considered is that of speed. We incline to the view that the liability of the owner of the car being established and the onus of proof of non-negligence being upon the driver, some liberty might be allowed as to speed upon clear and unobstructed stretches of road, but that in towns and villages, at all times, and wherever there is considerable traffic, the speed should be strictly limited, and any infraction of the rule laid down in this respect should be severely punished. There are those who think that the only statutory limit to the rate of speed should be that it should be reasonable and leave it to the constituted authorities to decide the question of reasonableness should the occasion arise. This would have the advantage of throwing all responsibility upon the motorist. There would be much to be said in favour of this if coupled with a provision for imprisonment in case of offence. In France there is no speed limit, but motorists are under strict police supervision, and it is said their methods work well.

What is wanted is to make motorists more careful—to make reckless driving “unpopular” with them. A few of them being sent to prison would “encourage the rest.” What might be termed mechanical devices for regulating speed and in other ways preventing accidents are not of much practical utility. The *mind* of the motorist must be acted upon.

This brings us to a proposition of much practical importance, viz., that “the punishment should fit the crime.” As we have pointed out a fine of fifty or even a hundred dollars is a penalty

which does not materially affect the wealthy motorist, whether inflicted on himself or his driver. The penalty to the professional driver who is careless, reckless or negligent, whether injury is caused or not, should always be imprisonment, and suspension, if not the withdrawal altogether of his license. To the unprofessional driver, whether owner or not, the penalty should be imprisonment, with possibly the option of a fine in exceptional cases, and a fine of sufficient magnitude to make careless or ignorant driving prove a very costly amusement.

Cases may arise as to whether an automobile can be said to be a "carriage" in the sense that that word is used in certain connections. This modern monster has so many points of difference from those ordinarily included in the word "carriage" that it might well be said to belong to a class by itself. This is illustrated by *Doherty v. Ayer*, 83 N.E. 677; 14 L.R.A. N.S. 816, in which the Massachusetts court held that an automobile is not a carriage within the meaning of the statute requiring towns and cities to keep their highways reasonably safe and convenient for travellers with their horses and carriages, and that the town is not liable for failure to make special provision for the safety of automobiles if its highways are reasonably safe and convenient for travel generally. This decision, of course, presents the rights instead of the liability of the users of motor cars on highways, but has a bearing also on the subject under discussion in this article.

The glory of the common law is that it moulds the rules of law to suit the changing circumstances of social life and business affairs of the community, so that this subject might, if time permitted, be left to the consensus of opinion of strong and wise judges, but unfortunately time does not permit, for lives and limbs are in jeopardy. There might be a danger in attempting to enact that the rules of the common law shall not necessarily be held to apply to the style of vehicular traffic so rapidly taking the place of that under which those rules grew up. These rules arose and developed under a very different condition of things, and it may well be said that some of them would not

have taken the form they have if the subject matter had been modern motor cars instead of carts, coaches and carriages. A consideration of this shews that appropriate changes in the existing rules of law are all the more reasonable and necessary. This is recognized by the legislature of the Province of Ontario (6 Edw. VII. c. 46). But even more stringent legislation would seem to be necessary for the protection of the public. Any one taking up the subject from that standpoint would, of course, study carefully legislation in England and in France, and the ordinances in force in those countries, where the evils are, by reason of a denser population, greater than in this Dominion and where more careful thought has been devoted to the consideration of the dangers and evils which have come in with the use of motor cars.

LAW REFORM.

PART II.—SETTLEMENTS.

One of the objects of the previous article was to try and shew that the subject of law reform does not depend only upon a change or improvement in the mechanism of litigation, but that without certain ethical and intellectual qualities and standards any changes in practice or in rules of law could only work a very superficial improvement. In other words no rules can be so good that they may not be misused and few can be so bad but that in the hands of sensible and conscientious practitioners they can be made to serve a useful purpose. Without, therefore, denying the importance of law reform in its popular sense, an attempt will be made to deal with some other matters equally pertinent and probably more important. One of these matters is the question of settlements to which reference has been already made in the earlier article. Naturally enough the subject of settlements has received comparatively little judicial consideration, the reason no doubt being that the very fact of an arrangement being made removes the matter from the cognizance of the

courts. It is curious, however, to note how little, if any, advocacy of compromise appears in our legal literature. Occasionally a judge in wise and thoughtful language points out that an action should never have been brought to court; but of direct argument in favour of the subject there are to the ordinary reader on legal topics few, if any, traces. Such must exist, no doubt, but it is probably incidental to some other subject and, therefore, known only to those who may hit upon it by chance. In the various codes of legal ethics which have recently been the subject of discussion in the United States, this very subject has received but slight consideration and has not been insisted upon with the emphasis that one might wish to see: see Transactions American Bar Associations for 1907, pp. 61 and 676, et seq.

For the honour of his profession the writer does not think or imply that this silence on the subject has any sinister explanation or proceeds from motives of self-interest on the part of solicitors. Indeed, self-interest, even under our present absurd tariff of costs probably dictates compromise to the average lawyer. Clients are in the end better satisfied and better off. The returns in the form of fees are generally quicker and more certain and there is not, as in the case of litigation between persons of moderate or small means, the same quantity of work done, but never paid for, because there is no tariff for it, or because the costs are so out of proportion to the amount involved that one has not the "face" to charge full fees. Probably lawyers have no more persistent detractors than the unsuccessful or even the successful litigant who has been obliged to pay a bill for which he sees no adequate return. For this reason alone the lawyer acting for the average litigant of moderate or limited means (of whom the great body of clients consist) finds it greatly to his interest to settle. Therefore, not only duty, but self-interest persuades us that we ought to bring about some amicable solution; and, in illustration of this, the writer may be permitted to say that in 16 or 17 years it has only once been suggested to him in words that a settlement was undesirable because both clients were well-to-do and able to pay the costs of

a good fight. Instances occur, of course, where there is some insurmountable, but not apparent, obstacle in the way of an adjustment, and where costs increase with surprising persistence, but even such examples are the exception and one is glad to believe and is justified in believing that where there are no settlements it is because no way of making a fair arrangement occurs to the parties. It is with the latter cases, however, that these remarks have most to do. Often the feelings of the litigants are the chief obstacle in the way. They are angry; and dramatically assert that they are fighting for "principle" and that they will spend their "last cent" in order to prove what a rascal their opponent is. In most of such cases, there is nothing for it but to begin action and let it continue until time and the costs of suit assist that sober second thought which generally comes to people in a temper. It may be remarked in passing that it often accelerates the arrival of a more judicial frame of mind to ask the gentleman who is going to spend his last cent in vindicating his position, for a substantial sum on account of costs before issuing the writ; and it is surprising how often the immediate payment of one hundred dollars will deter the rash litigant who has just announced his intention of staking all his substance upon the correctness of his views. Lawyers generally recognize and are entitled to insist that their judgment is better than the inflamed opinion of their client, and that it is their duty to find out some way of adjusting his quarrel even though the latter thinks that his opponent should be visited with the extreme rigour of the law.

There are some classes of cases which almost call for an apology from the solicitor who is concerned in them and which at least, it is his duty at all times to be ready to explain and defend to a demonstration. Those are cases of quarrels between relatives or cases in which bad feeling or some one's stupidity is unnecessarily encroaching upon an estate or some fund which is in dispute. The mere fact that whoever else may profit, the solicitor gets a larger share of the fund the more proceedings there are taken, at once puts the latter upon the defensive, and

though such cases exist and are properly undertaken by the most reputable firms, any one engaged in them professionally owes it to his profession and to himself to be able to shew that he has neglected no opportunity to shorten and cheapen proceedings and to put an end, by honourable means, to a quarrel which in the end is only going to do harm to his client.

It is to the honour of the profession that so few disputes between husband and wife, father and son, brother and sister, or others in close family or personal relationship find their way into the courts; but probably even fewer will thrive when and if the attention of the profession as a whole, and more particularly the younger members of it, is more frequently and more forcibly directed to the shame and impropriety of such disputes.

While on this subject the question of so-called speculative actions deserves some consideration. There are many cases of line fence disputes, libel, slander, crim. con. and malicious prosecution which have no merits in them and in which nothing is hoped for unless a verdict is secured against a defendant possessed of sufficient means to answer the judgment and costs. Such cases being generally undertaken by a class of solicitors whose patron saints are Messrs. Dodson and Fogg, and who are not much interested in settlements, except where they gain more than they would by going to trial, there is probably but little use in suggesting means of adjusting them and seeking to emphasize the morality of putting an end to such litigation; but there are other cases of injuries or death due to negligence where the claimant being poor, has a right to call on the profession for assistance in pressing a just claim, yet where no pecuniary reward can be hoped for unless damages are recovered. With exquisite irony our law by setting up a false standard of propriety and making it impossible to bargain for an adequate financial return for the risk taken, has rendered it difficult, if not out of the question for the better class of lawyers who respect themselves and desire to adhere even to false notions of propriety while they exist, to undertake such cases and they, therefore, often fall into the hands of devotees of Dodson and Fogg, who

make a living out of fomenting quarrels and prolonging them while there is a prospect of a larger financial return. If it were possible to accept without loss of dignity the bonâ fide retainer of the poor litigant, there would be in all probability a great falling off in the decisions on negligence because settlements would more frequently occur to the great benefit of both claimants and defendants.

The desirability of persistently and authoritatively pointing out the benefit of settlements especially to students and younger practitioners has already been reiterated in these remarks; but there is another point of view from which the same question may be approached. To many good lawyers the aspect of a settlement as an essential "step in the cause" never presents itself. They have been accustomed to see clients bring a writ or dispute into the office and to assist in grinding away till they turn it out a judgment, and the kind of judgment is almost a secondary matter. If it were part of the routine of an office to consider ways and means of settling just as we consider the form of pleading or the character of the evidence to be adduced at trial many actions might never come to trial at all. Then so often minor faults of temper or demeanour interfere. We have the "cocksure" solicitor who sees no hope for the other side; the solicitor whose client's geese are always swans and who becomes even angrier than the client at the other party's misdoings; and the solicitor who never trusts another, or who never sees a short cut whereby expense may be saved; and all these, acting in good faith, add enormously to the cost of litigation. If our Law School could inculcate and our Benchers and courts enforce the duty of compromising disputes, a marked improvement might be hoped for and new standards would soon be created to which the great majority of lawyers would gladly conform.

One hesitates to suggest any practical rules for bringing about settlements because to do so would be to state mere truisms current generally in the profession. So much, too, depends upon the demeanour and good temper of the solicitors themselves, and this leads to a discussion which is rather beyond the scope of a

legal journal. If one word on such a subject is permitted that word would be the reminder that a too positive or superior attitude on the part of either counsel is prejudicial. Incredible as it may seem, even the junior members of important firms have been known to err, and instances have occurred where the opinions of a country practitioner, hesitating in his speech and deferential in his manner, have prevailed over the definite assertions of younger men whose fathers have been extremely prominent.

The experience of men (both lawyers and laymen) having much to do with settlements has been that they must first carefully collect and consider the evidence as it will probably appear at a trial, and that they must be fortified with facts which they are prepared to disclose and prove to the other side. To do this there must be a frank interchange not only of views, but of evidence, and the first essential to such a conference or correspondence is that (whether expressed or not) all that is divulged must be treated as being without prejudice and must not be quoted, referred to or used in any proceedings other than the settlement. It is probably the experience of most lawyers in large practice that their confidence in such cases is seldom if ever abused, and judges are quick to discover and to prevent any improper use of information or offers made in the course of such negotiations.

The question frequently arises how far it is necessary or desirable to "bluff" the other side. It cannot be said that such tactics are improper or censurable in themselves; but it may safely be said that generally they are injudicious. No one can properly state as facts matters which he does not know to exist, and as a rule the other side is in possession of sufficient information to enable him to check, and roughly so, such statements of fact made to him. Besides that, solicitors must deal with their professional brethren not once, but frequently, and a solicitor who has once bluffed another and afterwards been discovered is a marked man and his subsequent attempts in the same direction are inevitably discounted. So also there is much

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manœuvering for position, that usually proves to be a waste of time and energy. One side hesitates to make an offer because the other will look upon it as a confession of weakness, but he will entertain one if made. It attempts to settle were a necessary incident to an action, this feeling would disappear, and in any case no one is hurt by an offer made without prejudice. If a man goes carefully over his case and makes up his mind that,—subject to anything which the other side may disclose,—there are certain limits and no others within which he can properly settle, he cannot be forced, by any overtures he may make, into any other position unless he chooses. Upon the whole it will probably be found that those most successful in handling clients' affairs lose no opportunity of trying to settle, stand on very little ceremony when the game is once fairly going, and play it with most of their cards upon the table.

SHIRLEY DENISON.

SOLOMON TO THE RESCUE.—A., an implement agent, induces B. to buy a machine from him and take his note for \$100. A. then fills up three more of his blanks, facsimiles, forges B.'s name to them and discounts them all at different banks. When the time comes B. receives four different demands for payment of his notes. He is an illiterate farmer and he can't "for the life of him" tell which is the genuine note., i.e., the one that he signed. All the banks threaten suit. The only evidence that can be offered is B.'s own, and that is no use. A comparison of the different documents results in the observation that he "can't tell t'other from which." The reader is requested to give his opinion as to the rights of the various parties, stating reasons.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

COLLISION—SUBSEQUENT TOTAL LOSS—PROXIMATE CAUSE—TEMPORARY REPAIR—REMOTENESS.

The Bruxellesville (1908) P. 312 was an action in the Admiralty Court arising out of a collision. The plaintiffs were the owners of the *Veritas* and the defendants were owners of the *Bruxellesville*. The latter vessel had run into the *Veritas* in the English Channel, after which the *Veritas* put into Portland, where temporary repairs were effected and she then proceeded to Bristol, her port of discharge, but when off the *Lizard* she sprung a leak and sank. The plaintiffs in these circumstances claimed to recover from the owners of the *Bruxellesville* as for a total loss, but Bucknill, J., held that the final loss of the vessel was due to the insufficiency of the repairs effected at Portland and that therefore the plaintiffs could not recover more than the actual damage occasioned by the collision.

ACTION FOR INFRINGEMENT OF PATENT—JUDGMENT—REVOCATION OF PATENT AFTER JUDGMENT—ESTOPPEL BY JUDGMENT—INQUIRY AS TO DAMAGES—DE FACTO PATENT.

Poulton v. Adjustable Cover & Boiler Block Co. (1908) 2 Ch. 430 was an action to restrain the infringement of a patent and to recover damages for infringement, and judgment was given therein in favour of the plaintiff and directing an inquiry as to damages. Pending the inquiry the patent was revoked for want of novelty. The defendants then set up the revocation as a bar to the recovery of damages. The Master found that by reason of the revocation of the patent the plaintiff had not sustained any damage, but if, notwithstanding the revocation, the plaintiff was entitled to damages he assessed them at £110, and from this report the defendants appealed to Parker, J., who held the judgment estopped the defendants from saying that the plaintiff had sustained no damages, and that the plaintiff was therefore entitled to substantial damages, and he gave judgment for payment of the £110. From his judgment an appeal was had to the Court of Appeal (Williams, Moulton, and Buckley, L.JJ.), which that court dismissed. The Court of Appeal says that

even if the revocation had the effect of making the patent null ab initio, that could not affect the result, because by the judgment the infringement became *res judicata*.

UNPUBLISHED PICTURE—PROPERTY IN PICTURE—COMMON LAW RIGHT IN PICTURES—INFRINGEMENT—PIRATED COPY—INNOCENT PUBLICATION—DAMAGES.

In *Mansell v. Valley Printing Co.* (1908) 2 Ch. 441, the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) have affirmed the judgment of Eady, J., (1908) 1 Ch. 567 (noted ante, p. 352), to the effect that the owner of a picture has a common law right of property in it, which altogether apart from the copyright statutes, entitles him to restrain its reproduction and publication against his will and without his consent; and that it is immaterial that the copy has been obtained surreptitiously by a third person and is published in good faith by another under the supposition that the third party was the rightful owner.

RAILWAY COMPANY—STATUTORY POWERS—POWERS EXERCISEABLE WITHIN LIMITED PERIOD—EXPIRATION OF TIME—COMPANY IN POSSESSION OF LAND—POWER TO CONSTRUCT RAILWAY THEREON—ULTRA VIRES.

Great Western Railway v. Midland Ry. (1908) 2 Ch. 455. This was an action for a declaration that the plaintiff company were entitled to exercise running powers over a part of the line of the defendant company, and for that purpose to construct necessary junctions. The defendant company had granted to the plaintiff company in 1898 a license to enter on and use the line in question and construct junctions therewith, but subject to the provisions of a certain Act, which inter alia provided that the plaintiff might construct the railway, but that "if the railways be not completed within five years from the passing of this Act, then on the expiration of that period, the powers granted by this Act to the company for making and completing the railways or otherwise in relation thereto shall cease except as to so much thereof as is then completed." The construction of the necessary junctions was not completed within the five years and the defendant company contended that the plaintiffs had no longer any power to construct them, and to do so would be *ultra vires*; but Warrington, J., who tried the action, came to the conclusion that the limitation only applied to those powers which

the company could not exercise except by virtue of the Act, but as the plaintiffs had within the five years acquired the necessary land and consequently the lawful right to use it, they might use it for the purpose of making the railway, notwithstanding that the five years had expired.

MINES—OVERLYING AND UNDERLYING SEAMS OF COAL—RIGHT TO SUPPORT—SUBSIDENCE—INJUNCTION.

Butterley Co. v. New Hucknall Colliery Co. (1908) 2 Ch. 475. The plaintiffs in this action claimed an injunction to restrain the defendants from working their mine so as to cause a subsidence of the plaintiffs' mine. In 1887 the Duke of Portland granted the plaintiff a lease of the seam of coal nearest the surface of a large tract of land with the usual powers to work and carry away the coal. This lease provided that it should be lawful for the Duke and his assigns to enter upon the mining area of the plaintiffs, and to sink to and work the mines underlying the mine leased to the plaintiffs, and in such case that they should indemnify the plaintiffs against any physical damage that might be caused by the operations of the tenants of the underlying mines. In 1893, the Duke leased to the defendants a seam of coal lying 170 yards under the plaintiffs' mine, and in working this mine in a reasonable and proper manner a subsidence was caused to the plaintiffs' mine which made it more difficult to work, hence the present action. The defendants contended that the reservation in the plaintiffs' lease of the right to work the underlying mines, exonerated them from liability, and that the doctrine of a right of support applied to surface rights and not to overlying and underlying mines, and that the clause as to damages involved the right to remove the support of the plaintiffs' mine, and that there could be no physical damage to the coal in plaintiffs' mine, merely by reason of the subsidence. Neville, J., however, declined to accede to this argument and came to the conclusion that there was nothing in the plaintiffs' lease apart from the reservation of the right to work the underlying mines which was inconsistent with the idea of the plaintiffs' right to a continuing support to his mine, and the right to take minerals beneath did not involve a right to let down the overlying strata, and consequently that the defendants' acts were unlawful and should be restrained by injunction, which was accordingly granted together with an inquiry as to damages.

**WILL—CONSTRUCTION—BEQUEST OF “ALL MY DEBENTURES”—
DEBENTURES AND DEBENTURE STOCK.**

In re Herring, Murray v. Herring (1908), 2 Ch. 493, a simple question was involved. A testator, having at the time of his will, and at the date of his death, both debentures and debenture stock in a certain company, by his will bequeathed “all my debentures and preferred and deferred stock in the Municipal Trust Co.,” and the point was, whether the debenture stock was included in this bequest. Joyce, J., decided that it was, being of the opinion that “all my debentures” included all kinds of debentures. We notice that the learned judge pays a graceful tribute to the late Mr. Vaughan Hawkins, who argued the case for the defendant, but died before judgment.

**WILL—LAPSE—DEATH OF ALL BENEFICIARIES AND EXECUTOR BEFORE TESTATOR—INTESTACY—INTESTATES’ ESTATES ACT, 1890
(53 & 54 VICT. c. 29)—(R.S.O. c. 127, s. 12).**

In re Cuffe, Fooks v. Cuffe (1908) 2 Ch. 500. The point decided by Joyce, J., is, that where all the beneficiaries and the executor named in a will die before the testator, who leaves a widow, and no issue; the testator has died intestate within the meaning of the Intestates Act, 1890 (see R.S.O. c. 127, s. 12), and that his widow is entitled to £500 (in Ontario it is \$1,000), out of his estate absolutely and exclusively.

GAMING—CAUSE OF ACTION—CHEQUE GIVEN FOR BET—FORBEARANCE TO PUBLISH DEFAULT—NEW CONSIDERATION—GAMING ACT (9 ANNE c. 14)—(R.S.O. c. 329)—AMENDMENT AT TRIAL.

Hyams v. King (1908) 2 K.B. 696. In this case the action was brought to recover a balance due on a cheque given in settlement of a bet won by the plaintiff from the defendants. At the request of the defendants the cheque was held over and not presented on part payment being made, and subsequently a fresh verbal agreement was come to by which in consideration of the plaintiff holding over the cheque and refraining from declaring the defendants defaulters, thereby injuring them with their customers, they promised to pay the balance owing in a few days. The action was tried by Darling, J.; there were no pleadings in the action except the indorsement claiming £48 10s. on an account stated. The learned judge at the trial appears to have thought

that the plaintiff was not entitled to recover as on an account stated, but he thought that the new agreement to refrain from posting the defendants as defaulters constituted a good consideration for the promise to pay the balance and he gave leave to amend by setting up that case, and, assuming the amendment to be made, gave judgment for the plaintiff for the amount claimed. No amendment was in fact made, but the majority of the Court of Appeal (Barnes, P.P.D., and Buckley, L.J.) agreed with the view of Darling, J., and allowed the amendment to be made *nunc pro tunc*, but as the amendment had not been made at the trial, refused the plaintiff the costs of the appeal. Moulton, L.J., however, delivered a very able dissenting judgment, holding that the Statute of Anne had made cheques given for gaming debts a nullity and therefore the giving of time for payment thereof, or refraining from publishing to others that the defendants had made default in paying the cheque which was null and void, could not in law be a consideration for a new promise to pay it. The majority of the court, however, hold that a bet was not unlawful at common law, and no statute had made it so; that although the Statute of Anne made securities given in payment of bets void and prohibited actions to enforce such securities, yet the bet itself was not made illegal, and that it was still a debt of imperfect obligation, and the forbearance of posting the defendants as defaulters was a good consideration for a promise to pay. To hold otherwise, their Lordships think, would be to legislate, and yet we cannot forbear thinking that the conclusion of Moulton, L.J., more effectually carries out the existing statute law on the subject, whereas that of the majority merely furnishes an ingenious legal method for its evasion.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] BRENNER v. TORONTO RLY. Co. [Oct. 6.
*Negligence—Street railway—Rules of company—Charge of
judge—Contributory negligence.*

A rule of the Toronto Rly. Co. provides that "when approaching crossings and crowded places where there is a possibility of accidents the speed must be reduced and the car kept carefully under control. Go very slowly over all curves, switches and intersections; never faster than three miles an hour. . . ." A girl on the south side of Queen Street wished to cross to University Avenue, which reaches, but does not cross, Queen. She saw a car coming along the latter street from the east, but thought she had time to cross, but was struck and severely injured. On the trial of an action for damages the judge in his charge said: "It is not a question, gentlemen of the jury, as to the motorman's duty under the rule, it is a question of what is reasonable for him to do." The jury found that defendants were not guilty of negligence; that plaintiff by the exercise of reasonable care could have avoided the injury; and that she failed to exercise such care by not taking proper precautions before crossing. The action was dismissed at the trial; a Divisional Court ordered a new trial on the ground that the judge had misdirected the jury in withdrawing from their consideration the rules of the company. The Court of Appeal restored the judgment at the trial.

Held, affirming the judgment of the Court of Appeal (15 O.L.R. 195) which set aside the order of the Divisional Court for a new trial (13 O.L.R. 423), Idington, J., dissenting, that the action was properly dismissed.

Held, per GIROUARD and DUFF, JJ.—The judge's charge was open to objection, but as under the findings of the jury and the evidence plaintiff could not possibly recover, a new trial should be refused.

Per DAVIES, J.—There was no misdirection. The jury were not led to believe that the rules were not to be considered, but only that they should be the standard as to what was or was not negligence, which question should be decided on the facts proved.

Per MACLENNAN, J.—The place at which the accident occurred, where University Avenue meets Queen Street, is not a crossing or intersection within the meaning of the rules and they do not apply in this case.

Appeal dismissed with costs.

G. F. Henderson, K.C., for appellants. D. L. McCarthy, K.C., for respondents.

Ont.] BEATTY v. MATHEWSON. [Oct. 6.

Contract—Construction—Sale of timber—Fee simple—Right of removal—Reasonable time.

In 1872 M., owner of timber land, sold to B. the pine timber thereon with the right to remove it within ten years. In 1881 another agreement replaced this and all the timber standing, growing or being on the land "to have and to hold the same unto the said party of the second part, his heirs and assigns forever" with a right at all reasonable times during some years to enter and cut and remove the same." B. exercised his rights over the timber at times up to his death in 1898 and his executors did so after his death, M. not objecting. In 1903 persons authorized by said executors entered and cut timber and continued until 1905. The following year M. brought an action for an injunction against further cutting, a declaration that the right to take the timber had lapsed and for damages.

Held, affirming the judgment of the Court of Appeal (15 O.L.R. 557), Davies and Duff, JJ., dissenting, that the instrument executed in 1881 did not convey to B. the fee simple in the standing timber, but only gave him the right to cut and remove it within a reasonable time and that such time had elapsed before the entry to cut in 1903 and M. was entitled to damages.

Appeal dismissed with costs.

Hodgins, K.C., and Stone, for appellants. Powell, K.C., for respondent.

Que.] [Oct. 6.

MONTREAL LIGHT, HEAT & POWER CO. v. REGAN.

Negligence—Dangerous works—Protection of employees—Evidence—Questions for jury—Judge's charge—Findings of fact—Inferences.

An experienced employee of the defendants was killed by an explosion of illuminating gas while discharging his duties in the

meter-room at the defendants' gas works. It was shewn that there might possibly have been an escape of gas from the controllers or other fixtures in the room or in the blow-room adjoining it; that there had been no special precautions by the defendants to detect any such escape of gas that might occasionally happen, and that the meter-room had always been, and at the time of the accident, was lighted by means of open gas jets. There was no exact proof of any particular fault attributable to the defendants, which could have been the whole cause of the explosion, and its origin and course were not explained. In an action for damages by the widow and representatives of deceased, the jury found that the explosion had resulted from the fault and imprudence of the defendants in lighting the meter-room by open gas jets, and contributory negligence on the part of deceased was negatived.

Held, affirming the judgment appealed from (Q.R. 16 K.B. 246), Davies and MacLennan, JJ., dissenting, that in the circumstances the jury were justified in finding that there had been such negligence and imprudence on the part of the defendants in such use of open gas jets as would render them responsible for the injury complained of.

Appeal dismissed with costs.

R. C. Smith, K.C. and *G. H. Montgomery*, for appellants.
Oughtred, K.C., and *W. H. Butler*, for respondent.

Board of Rly. Commrs.]

[Oct. 6.

ESSEX TERMINAL CO. v. WINDSOR, ESSEX & LAKE SHORE RAPID
RLY. CO.

*Board of Railway Commissioners—Jurisdiction—Location of
railway—Consent of municipality—Crossing—Leave of
Board—Discretion.*

On 12th August, 1905, the Township of Sandwich West passed a by-law authorising the W. E. etc., Rly. Co. to construct its line along a named highway in the municipality, but the powers and privileges conferred were not to take effect unless a formal acceptance thereof should be filed within thirty days from the passing of the by-law. Such acceptance was filed on 12th September, 1905. This was too late and on 20th July, 1907, the Council of Sandwich West and that of Sandwich East respectively passed by-laws containing the necessary authority.

In April, 1906, the location of the line of the E. T. Rly. Co. was approved by the Board. In June, 1906, the Board made an order allowing the W. E., etc., Co., to cross the line of the C.P.R. In March, 1907, another order respecting said crossing was made, and also an order approving the location of the W. E. Co., the municipal consent being obtained three months later. The E. T. Co. applied to the Board to have the orders of June, 1906, and March, 1907, rescinded and for an order requiring the W. E. Co. to remove its track from the highway at the point where the applicant proposed to cross it, to discontinue its construction at such point, or in the alternative, for an order allowing it to cross the line of the W. E. Co. on said highway. The applicants claimed to be the senior road and that the W. E. Co. had never obtained the requisite authority for locating its line. On a case stated to the Supreme Court by the Board,

Held, 1. The Board had power to refuse to set aside the said orders; that the by-laws passed in July, 1907, were sufficient to legalize the construction of the W. E. Co.'s line on said highway; and that the Board can now lawfully authorize the latter company to maintain and operate its railway thereon.

2. Leave of the Board is necessary to enable the E. T. Co. to lay its tracks across the railway of the W. E. Co. on said highway.

3. The Board, in exercise of its discretion, has power by order to authorize the maintenance and operation of the W. E. Rly. Co. along said highway and to give leave to the E. T. Co. to cross it and the line of the C.P.R. near the present crossing, and to apportion the cost of maintaining such crossing equally between the two companies instead of imposing two-thirds thereof upon the E. T. Co., as was done by a former order not acted upon; and to order that if the E. T. Co. finds it necessary in its own interest to have the points of crossing differently placed, it should bear the expense of removing the line of the W. E. Co. to the new point of crossing.

Appeal dismissed with costs.

Armour, K.C., and Coburn, for appellants. Matthew Wilson, K.C., for respondents.

Crim. Code.]

IN RE SEELEY.

[Oct. 27.

Criminal law—Indictable offence—Summary trial—Jurisdiction of magistrate—Offence committed in another county.

If a person is brought before a justice of the peace charged with an offence committed within the province, but out of the

limits of the jurisdiction of such justice, the latter, in his discretion, may either order the accused to be taken before some justice having jurisdiction in the place where the offence was committed: Crim. Code (1892) s. 557; Crim. Code (1906) s. 665, or may proceed as if it had been committed within his own jurisdiction. S. was brought before the stipendiary magistrate of the City of Halifax charged with having committed burglary in Sydney, C.B.

Held, that the stipendiary magistrate could, with the consent of the accused, try him summarily under Crim. Code (1892) s. 785, as amended in 1900, Crim. Code (1906) s. 777.

O'Hearn, for appellant. *J. J. Power*, K.C., for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Teetzel, J.]

REX *v.* TITCHMARSH.

[Oct. 13.

Summary conviction—Crim. Code, ss. 530, 682, 711—Quashing conviction—No evidence taken down.

The defendant was convicted by three justices for polluting a well on his premises which was also used by other persons. The defendant put in a claim of right; but no evidence whatever was taken down in writing at the hearing of the case before the justices. On application to quash the conviction on a number of grounds,

Held, that as there was no evidence produceable to sustain the conviction, it must be set aside for want of jurisdiction.

Quære. Whether apart from the provisions of the Code the conviction was not for the reason alleged made without jurisdiction.

J. B. MacKenzie, for applicant. No one appeared for the justices or the prosecutor.

Anglin, J.]

REX v. SIMMONS.

[Oct. 16.

Criminal law—Conviction—Commitment—Habeas corpus—Proceedings anterior to conviction—Liquor License Act—Second offence—Admission of previous offence—Record—Magistrate's minute—Uncertainty—Discharge of prisoner—Excessive penalty—Power to amend.

Although a conviction on its face appears sufficient to support the commitment of the defendant, the court will, on the return of a habeas corpus, examine the proceedings anterior to the conviction to see if they warrant his detention, and, if they do not, will order his discharge. *Regina v. St. Clair* (1900) 27 A.R. 308 followed.

The defendant was convicted on the 15th September, 1908, for selling liquor without a license; the conviction recited that the defendant had been convicted on the 17th October, 1907, of having unlawfully sold liquor without a license; and the punishment adjudged was imprisonment for four months without hard labour—the statutory penalty for a second offence. The only record in the proceedings in respect to any previous conviction was contained in an indorsement upon the information in the handwriting of the magistrate, as follows: "The defendant makes a statement that he was convicted of selling between 4 Oct. and the 14 Oct., 1907, and I find the within charge a second offence for selling. I commit the defendant to the county gaol for four months' without hard labour."

Held, that sub-s. 6, of s. 101, of the Liquor License Act, R.S.O. 1897, c. 245, requires that the subsequent offence and the earlier offence shall each be an offence in contravention of one of the sections numbered 49, 50, 51, 52, or 72, or an offence against some other section for which no penalty is provided except by s. 86. The admission as recorded might mean that the defendant had previously been convicted of an offence against s. 78 (2) or against s. 124 (1), or of selling on licensed premises in prohibited hours; proof or the admission of a former conviction for any of these offences would not warrant a later conviction under s. 72 being treated as a second offence under sub-s. 6 of s. 101; and this fact sufficed to render the admission of the accused as recorded by the magistrate so uncertain that it was inadequate to sustain his conviction as for a second offence; and he should be discharged from custody under the commitment.

Semble, that the court had no power to amend the conviction by substituting the maximum penalty prescribed by s. 72 for a first offence.

J. B. MacKenzie, for defendant. *J. R. Cartwright*, K.C., for Crown.

Falconbridge, C.J., MacMahon, J., Riddell, J.] [Oct. 10.

QUART v. EAGER.

Vendor and purchaser—Conveyance—Covenant for additional payment if land disposed of by purchaser—Recitals—Breach of covenant—Conveyance by purchaser—Personal order—Lien—Declaration—Enforcement by sale—Covenants running with the land.

Appeal by defendants from the judgment of BOYD, C. By conveyance of October, 1901, the land in question was conveyed by the plaintiff to Daniel Eager and Thomas Sanderson for \$200 with the proviso that if the land is fenced in the manner forbidden, or in the event of its being sold, leased or otherwise disposed of, a further sum of \$500 cash as additional consideration should be paid, making \$700 in all. The strip was sold as an entrance for railway purposes to mill property, and evidence was given that the plaintiff had confidence that the original purchasers could not use it so as to be a source of trouble and annoyance to him and so reduced the price on the above condition. Eager and Sanderson sold this portion with other portions to Eager & Sanderson Co. by conveyance made subject in express terms to the stipulations, covenants, and conditions set out in the first deed of 1901. Eager & Sanderson Co. sold and conveyed the strip in July, 1904, to William Eager and Richard Eager, the present defendants, and this conveyance was again made expressly subject to the original stipulations in the deed of 1901. The plaintiff now asks for the payment of \$500 with a lien on the land and personal judgment against the defendants.

The defence was that there was no privity of contract and that the transaction sued on was void as being in restraint of alienation and on the ground that the conveyance of 1901 transgressed the rule as to perpetuity.

Held, 1. That where the operative part of a deed appears to

be intended to follow, but does not accurately follow, the words of the recital, the effect of the operative party will be controlled by the recital, and "the further sum of \$500" is clearly stated in the first recital in the deed of Oct. 7, 1901, to be "an additional consideration for said land" and the Chancellor was right in holding the \$500 to be part of the consideration, and as it had never been paid it formed a lien on the land.

2. For reasons set forth in judgment of RIDDELL, J., the personal judgment against the defendants could be sustained.

Per RIDDELL, J.:—In addition to the grounds upon which the decision is put by the Chancellor, it was argued before us that the mere fact of taking a conveyance of land subject to an incumbrance obligated the grantee to pay off the incumbrance, and this is a fortiori if there were a covenant to indemnify the grantor. The bald proposition first set out is, of course, based upon *Waring v. Ward*, 7 Ves. 332, and like cases, but, whatever may be the rights as between grantor and grantee, there can be no doubt that the incumbrancer cannot take advantage of the equitable right to indemnity (if it exist) and bring his action against the grantee directly: *Walker v. Dickson*, 20 A.R. 96. If there be an express covenant on the part of the grantee with the grantor, the case is not advanced. The doctrine supposed to be an equitable one that if A. promise B. that he (A.) will pay to C. B.'s debt to C., then C. can sue A. for the same, is not tenable. Some discussion of this heresy will be found in *Kendrick v. Barkey*, 9 O.W.R. 356., at pp. 358 et seq. Nowadays the difficulty is got over by the original creditor taking from the new grantor an assignment of his rights against the grantee: *British Canadian Loan Co. v. Tear*, 23 O.R. 664.

It may be noticed also that in the conveyance to these defendants they do not covenant to indemnify their grantors or any one, and the conveyance is not even subject to the conditions, etc., of the original deed from Quart. And the stringent rule of *Carter v. Carter*, 26 Gr. 232, in which Blake, V.-C., held that if there is a devise of land subject to the payment of an annuity, and the devisee accepts the devise, he will be held to have assumed a personal liability to pay the amount, has never been extended to the case of a grantee. The only ground upon which the personal judgment against these defendants can be supported, if at all, is that upon which it is put by the Chancellor, that is, the covenant by the original grantees, and this being held to run with the land.

I am unable to see in what way the payment of part of the consideration can be said to touch or concern the land conveyed. It is not like the rent, which, in the theory of the law, issues out of the land devised—though even as to rent see *Milnes v. Branch*, 5 M. & S. 411—it is much of the nature of a covenant on the part of a lessor to pay on a valuation for trees planted by the lessee: *Gray v. Cuthbertson*, 4 Doug. 351 (although in that case indeed the breach was the refusal to name an arbitrator to fix the value of the trees); or to pay for improvements: *Guten v. Gregory*, 3 B. & S. 90; or by lessee to pay in addition to the rent 10 per cent. on the outlay the less should make in improvement of the buildings: *Lambert v. Norris*, 2 M. & W. 333; *Hoby v. Roebuck*, 7 Taunt. 157; *Donellan v. Read*, 3 B. & Ad. 899; *Martyn v. Clue*, 18 Q.B. 661. See also *Webb v. Russell*, 3 T.R. 393; *Stokes v. Russell*, 3 T.R. 678; *Russell v. Stokes*, 1 H. Bl. 562. Such covenants have been held to be merely personal between the covenanting parties, and not to bind the assignees, even if named.

I do not press the point here that the original grantees did not even in form bind their assigns to pay, the covenant reading that they, "for themselves, their executors, administrators, or assigns, covenant," etc. Nor do I enter into the larger inquiry whether except in the case of landlord and tenant, the burden of a covenant can run with the land. This has been very fully considered by the Court of Appeal in *Austerberg v. Oldham*, 29 Ch. D. 750. All the cases theretofore were examined, and, while the court did not absolutely decide that this principle was confined to the case of landlord and tenant, they in effect made its quietus for the proposition that it extended beyond. In that case A. sold a piece of land to B. as part of the site of a road intended to be built and maintained. B. covenanted with A., his heirs and assigns, that he, his heirs and assigns, would make the road and keep it in repair. This land was bounded on both sides by other lands of A. A. sold to the plaintiff; B., to the defendants; both with notice of the covenant. It was held by the Court of Appeal, affirming the decision of the Vice-Chancellor of the Duchy of Lancaster, that the plaintiff could not enforce the covenant against the defendant, as the covenant did not and could not run with the land. Upon the equitable doctrine that a person who takes with notice of a covenant is bound by its being appealed to—and Rigby, L.J., in *Rogers v. Hosegood*, [1900] 2 Ch. 388, at p. 401, says: "I do not think any covenant runs with the land in equity. The equitable doc-

trine is that a person who takes with notice of a covenant is bound by it"—the court held that the said equitable doctrine, established as it is by *Tulk v. Moxhay*, 2 Ph. 774, applies only to restrictive covenants, i.e., covenants respecting the mode of using the land, as indeed had already been held in *Haywood v. Brunswick Society*, 8 Q.B.D. 403, and *London and South Western R.W. Co. v. Gomm*, 20 Ch. D. 562.

As to the lien. Evidence was admitted by the Chancellor at the trial as to the circumstances surrounding the making of the deed, and I think rightly: *Frail v. Ellis*, 16 Beav. 350. It is a very old head of equity that if the purchase money or any part of it is unpaid, and the vendor gives possession, he will have a lien on the estate for the unpaid purchase money. This principle, which is said to be "a natural equity," was laid down by the Court of Chancery at least as early as 1684, when the Lord Keeper, Sir Francis North, Lord Guildford, expressly so decided in *Chapman v. Tanner*, 1 Vern. 267. This "lien is not in general discharged by the vendor taking security for the purchase money by bond, bill, or note, unless under circumstances clearly shewing that it was his intention to rely not upon the security of the estate, but solely upon the personal credit of the purchaser": Watson's Compendium of Equity (2 ed.), p. 1172. The rules for determining this question may be deduced from two well-known cases, *Parrott v. Sweetland*, 2 My. & K. 655, and *Frail v. Ellis*, 16 Beav. 350. In the former case Lord Commissioner Shadwell, in delivering the judgment of the court (himself, the Vice-Chancellor, and Mr. Justice Bosanquet) says (in speaking of the question whether a lien is excluded), p. 664: "It is manifest that in Lord Lyndhurst's opinion the proper way of dealing with questions of this kind is to look at the instruments executed by the parties at the time, and upon them to declare what the meaning of the parties must have been." In the latter Sir John Romilly, M.R., says: "I am of opinion that the form of the deed does not conclude the parties. . . . I am of opinion that in accordance with all the cases it is possible for the parties to shew what the real nature of the contract was." Accordingly the Master of the Rolls in that case allowed evidence which convinced him that the vendor executed the conveyance of the property in the faith and assurance that a mortgage deed to secure the balance money had been executed. This, he held, completely destroyed the effect of the deed executed at the time, which expressed that the consideration was £150 then paid, and the acceptance of the purchaser of £300 at 3 months,

at the same time delivered to the vendor, "the receipt whereof he did thereby respectively acknowledge, and that the same were in full satisfaction for the absolute purchase" of the property. It seems to have been considered that if some such evidence had not been given, the form of the deed would be binding. As I understand the law, the form of the deed is what must alone be looked at to declare the intention of the parties, unless, by some evidence de hors the deed, the parties can shew that the real nature of the contract was different—and such evidence must be received and considered.

In the present case I cannot see that the parol evidence assists the plaintiff's position, but rather the reverse. Looking at the deed alone, the consideration is explicitly "the sum of \$200 . . . now paid . . . the receipt whereof is hereby . . . acknowledged, and in further consideration of the several covenants, promises, and stipulations hereinafter set forth, to be kept, done, and performed by the said parties of the second part or their heirs and assigns . . ." It seems to me that here the parties themselves have fixed the consideration as being part in cash and part in promise—not all in money—with a collateral agreement to pay such part thereof as may not yet have been paid. If this conclusion is sound, no vendor's lien ever attached. And I do not think that the case of the plaintiff is advanced by the fact that in the recitals the sum of \$500 is spoken of as "additional consideration for said land, making in all \$700 therefor"; the covenant for payment has the same expression in effect "as an additional consideration of said land, making in all therefor the sum of \$700."

From an examination of the deed, together with (and perhaps without) a consideration of the circumstances surrounding the making of it, it seems manifest that \$200 was considered about the value of the land taken along with the detriment to the plaintiff, so long as the original grantees held the land themselves, and used and operated the railway expected to be built in the manner the plaintiff thought they would, and did not fence it in. No doubt, there was a good deal of talk about the manner in which the railway would be operated. Whether this was so or not, it seems to me obvious that the parties looked upon the \$200 as the price of the property. Then, to prevent the property being fenced, a covenant is taken that it shall not be fenced without written permission, and that, if fenced, \$500 shall be paid to the plaintiff. Can it be said that this \$500 is in reality part of the purchase price, the "purchase money." To prevent

the grantees readily parting with, conveying, or disposing of the property, it is provided that if they do so either they or their heirs or assigns must pay this same sum. The position of the sum if they should sell does not seem to me at all different from that of the same sum if they fence, and the fact that this sum is in either case called a "further consideration" does not advance matters one whit.

It seems to me that the sum of \$500 is a rough computation of the amount of damages the plaintiff would expect that he would or might suffer if the prohibited fencing were proceeded with (and this is helped out by the covenant in that regard), or by his friends losing control over the line of rail. It is a penalty or liquidated damages, but I think no part of the purchase money, and no vendor's lien attaches.

Province of Nova Scotia.

SUPREME COURT.

Graham, E.J.]

[Oct. 9.

COULSTRING v. NOVA SCOTIA TELEPHONE CO. ET AL.

Nuisance—Joinder of two parties defendant—Motion to compel plaintiff to elect dismissed.

Where in an action for a nuisance, namely, obstructing the access to plaintiff's house by the erection of a board fence in front of an adjoining building in course of construction, etc., brought against the defendant company and the contractor employed by them, plaintiff, in his statement of claim charged that the defendant company was erecting the building and committed the acts of obstruction complained of, and alleged in the same terms that the defendant H. was erecting the building and committed the act, application was made on behalf of one of the defendants to compel plaintiff to elect which of the defendants he would proceed against and on behalf of the other to strike out his name.

Held, dismissing the application with costs, that the transaction complained of being one and the same there was no objection to plaintiff stating his claim first against the one defendant and then, in the alternative, against the other.

Also, that under O. 16, R. 5, the defendant H. could be joined, although he was not connected with one of the acts of trespass complained of.

Henry, K.C., for plaintiff. *Chisholm, K.C.*, and *T. R. Robertson*, for defendants.

Longley, J.]

[Oct. 23.

EASTERN TRUST CO. v. BOSTON-RICHARDSON CO.

Advance of money to pay wages—Claim of lien dismissed.

G. & Son, acting as agents for the defendant company had been in the habit for some time of advancing money for the payment of wages, on orders drawn upon them by the company, and afterwards drawing upon the company to reimburse themselves for the amounts so advanced. The company being in default to bondholders, a winding-up order was granted and the plaintiff company appointed receivers. After the winding-up order had been granted the receivers had entered into possession, G. & Co. secured assignments of their claims and rights from the employees whose orders they had paid, and claimed a lien on account of the advances made, and to be placed in the same position that the men would have been in if their wages had not been paid.

Held, that G. & Co. were not entitled to the lien claimed, the moneys advanced by them having been paid in accordance with the previous course of business, and entirely on the credit of the company, and without any agreement between them and the men to whom the moneys were advanced for an assignment of their rights in consideration of such advances.

W. B. A. Ritchie, K.C., for claimants. *Mellish, K.C.*, for Trust Company.

Longley, J.]

[Oct. 23.

HALIFAX GRAVING DOCK CO. v. MAGLIULO.

Shipping—Advance of money for purposes of repair—Priority of payment as against attachers under absent or absconding debtor process.

Defendants' vessel arrived at H. in a damaged condition and it being necessary to procure funds to enable the cargo to be removed for the purpose of enabling a survey to be held and repairs effected an advance of \$2,000 was obtained from W., the security for which was an agreement signed by the master of the

vessel and the Italian consul, acting as agent for the owners, undertaking, in case any moneys were received from the owners on account of the vessel or cargo, etc., that a sufficient portion thereof should be applied first in repayment of the amount advanced, with interest, etc. It became necessary to sell the ship and cargo and an adjuster was appointed to determine the general average and the contributions of the ship and cargo respectively and under his adjustment a large contribution towards general average was found to be due from the cargo to the ship. The master of the ship and the owner's agent thereupon gave W. an order on the adjuster for the payment of his advance and interest out of the funds to be obtained from the sale of the ship and the general average contribution, which the adjuster accepted payable when in funds. The agents of the cargo, S. C. & Co., who had notice of the advance made by W., delayed paying over to the adjuster the cargo's contribution to general average and while the money was in their hands, but after the order in favour of W. had been drawn upon the adjuster and conditionally accepted, plaintiffs took proceedings against the owners of the ship as absent or absconding debtors and attached the funds in the hands of S. C. & Co.

Held, that the undertaking given to W. by the master of the vessel and the owners' agent, on the faith of which the advance was made, and the subsequent order drawn upon the adjuster and accepted by him, constituted an equitable assignment and gave W. a claim upon the fund in the hands of S. C. & Co., for the amount advanced and interest prior to that of the attaching creditors.

Mellish, K.C., for plaintiffs. *W. B. A. Ritchie*, K.C., for claimant. *Stairs*, for garnishee. *Knight*, for defendants.

Graham, E.J.] SMITH v. MCGILLIVRAY. [Oct. 26.

Easement—Right of way—Evidence—Lost grant—License—Admission.

In an action for trespass to plaintiff's land the defence was user of a way as of right for twenty years before action brought; also a claim of way by lost grant; also under a compromise of an action brought some eight years previously, the terms of the compromise being that defendant was to have the user of the way upon condition of keeping up a gate. Evidence was given to shew that within the period of twenty years plaintiff closed

up the way, and then agreed to its being re-opened at the request of defendant upon condition that defendant would place a gate across the way and keep it up.

Held, 1. This evidence excluded the idea that the way was enjoyed as of right.

2. The doctrine of lost grant was not applicable where the enjoyment could be otherwise reasonably accounted for.

3. The compromise of the former action did not constitute an estoppel, but was merely a license which plaintiff was at liberty to withdraw.

Semble, an admission as to a mixed question of law and fact by a layman, particularly in reference to a question of right of way, is not conclusive.

Gregory, K.C., for plaintiff. *Griffin*, for defendant.

Province of Manitoba.

COURT OF APPEAL

Full Court.]

MURPHY v. BUTLER.

[Oct. 2.

Principal and agent—Commission agent—Liability of principal to agent on contract entered into by agent in his own name on behalf of principal—Sale on Grain Exchange.

The defendant, a farmer residing in the United States, instructed plaintiffs, brokers and members of the Winnipeg Grain Exchange, to sell for him 4,000 bushels of oats for future delivery at 37 cents per bushel or better. Pursuant to these instructions, the plaintiffs sold in their own names, according to the rules of the Exchange, 4,000 bushels of oats to one Pearson for October delivery at 38½ cents per bushel, making themselves personally liable on the contract. They promptly advised the defendant of the sale and the price, and defendant did not repudiate the transaction. Defendant refused to deliver the oats and plaintiffs, on the last day of October, were compelled to purchase the 4,000 bushels of oats at 63 cents a bushel in order to carry out their contract with Pearson.

Held, that the plaintiffs were entitled to recover from the defendant the amount of their loss, viz., the difference between 38½ and 63 cents per bushel on the 4,000 bushels.

The defendant had no right to expect that any contract would be drawn up between himself and the purchaser which

would be signed by the parties and sufficient privity of contract between them had been established by what had taken place to enable the defendant to sue the purchaser on this contract if he had so desired.

Brokers on the Exchange buying or selling for a principal are not bound to disclose his name or to make him a party to the contract, and the proved custom of the trade on the Exchange by which the members make themselves personally liable for all transactions entered into is a reasonable one and necessary for the prompt and safe dispatch of business.

Robinson v. Mollett, L.R. 7 H.L. 802, distinguished; *Scott v. Godfrey* (1901) 2 K.B. 726 followed.

Noble and Card, for plaintiffs. *Affleck*, for defendant.

Full Court.]

KING v. PORTER.

[Oct. 3.

Criminal law—Information, sufficiency of—Particulars—Conviction—Doing “an unlawful act.”

Applications for habeas corpus to release prisoner convicted before a police magistrate under s. 517 of Crim. Code “for that he did unlawfully in a manner likely to cause danger to valuable property without endangering life on person, do an unlawful act in the C.P.R. yards in the City of Winnipeg,” and sentenced to three months’ imprisonment. There was nothing in the information or conviction to shew the nature of the alleged unlawful act, although the evidence shewed that the prisoner had put stones in the journal of a car on the railway track.

Held, that the conviction was bad as it did not shew the nature of the unlawful act charged, and that the prisoner should be discharged, the order to contain the usual clause protecting the magistrate.

Patterson, D.A.-G., for the Crown. *Locke*, for the prisoner.

Full Court.]

WALD v. WINNIPEG ELECTRIC RY. CO.

[Oct. 12.

Negligence—Street railway—Duty of company to put on wheel guards—Damages—New trial.

In an action for damages by reason of a car of the defendants running over the plaintiff, a child under six years old, and cutting off one of her legs, the jury at the trial in answer to questions found that the injury to the plaintiff was caused by the negligence of the defendants, that such negligence consisted,

amongst other things, in not having the car wheels guarded, and fixed the damages at \$8,000.

Held, 1. The evidence shewed that the plaintiff got under the car owing to the absence of a wheel guard and that, if there had been a proper wheel guard, the accident would not have happened, and that the jury were warranted in finding that the absence of such wheel guards constituted such negligence as to render the defendants liable for the consequences that ensued.

2. The damages were not so excessive as to warrant an order for a new trial.

Bonnar and Cohen, for plaintiff. *Laird and Haffner*, for defendants.

KING'S BENCH.

Cameron, J.]

WATSON v. FREE PRESS.

[Sept 30.]

Contract—Intention ascertainable only from words and acts of contracting party.

In this case the defendant company instructed an architect named Bristow to employ a contractor to perform certain work for the defendants in reconstructing a roadway which had got out of repair. Bristow employed the plaintiff who did the work and sued for the price. Defendants contested their liability to the plaintiff and set up that they had supposed the plaintiff had been employed to do the work by their architect Stone through his agent Bristow in consequence of their complaint against Stone that he was responsible for the defective condition of the roadway. It appeared, however, that, although the defendants' officers, under the circumstances, were justified in their belief that Bristow was still in Stone's employment and that Stone had ordered the work to be done, Stone had not in fact given Bristow any such instructions, that, at the time Bristow received his instructions from the defendants, he was no longer in Stone's employ, and that neither the plaintiff nor Bristow had any knowledge or notice of what was in the mind of the defendants' officers when they instructed Bristow to have the work done.

Held, that the defendants were liable to the plaintiff for the price of the work, notwithstanding they had supposed that he had been employed by Stone's agent to do it.

The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his

cover all after-acquired goods and chattels brought upon the premises owned or occupied by the plaintiff company or used in connection with their business during the currency of the mortgage. The plaintiff company had been incorporated prior to the date of the chattel mortgage and Lyone Bros. were the principal promoters and became its president and vice-president respectively, being, in fact, the controlling shareholders. \$2,104.64 of the money lent by the defendants to Lyone Bros. was handed over to the plaintiff company and by it applied towards payment of the debts of Lyone Bros. The plaintiff company paid an instalment of the interest due to defendants on the \$4,000 loan.

Held, 1. The provision in the chattel mortgage as to the after-acquired goods was as binding for the plaintiff company as purchasers of the mortgage property with notice of it as it would be upon the executors or administrators of the mortgagors, and that the defendants had a good and valid lien and charge upon all after-acquired goods brought upon the premises in question by the plaintiff company.

Mitchell v. Winslow, 2 Story 630, followed.

2. The plaintiff company was under the circumstances estopped from disputing such lien and charge: *Pickard v. Sears*, 6 A. & E. 460; *Freeman v. Cooke*, 18 L.J. Ex. 119, and defendants were entitled to shew in evidence the facts constituting such estoppel, although it had not been pleaded as an estoppel in pais and need not be pleaded to make it obligatory: *Freeman v. Cooke*, *supra*.

3. The mortgage was not void as to the after-acquired goods because of the generality and vagueness of the description. *Lazarus v. Androde*, 5 C.P.D. 318, followed.

Action dismissed with costs.

Phillipps and *Clapman*, for plaintiffs. *Dennistoun*, K.C., for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.]

MASON v. MESTON.

[Oct. 10.]

*Municipal law—Contract or agreement with the corporation—
Disqualification—Debt due to corporation—Compromise of
—Penalty—Bona fides—Discretion.*

Defendant, having a judgment by the city against him for taxes, entered into an understanding with the city, whereby, in

consideration of a promise to pay, and an extension of time for payment, a release of one-half the amount of such taxes was given. He was afterwards nominated and elected as an alderman.

Held, that this agreement came within the disqualification clause of the Municipal Clauses Act.

Held, further, that as in this case the defendant had acted bonâ fide, the court would exercise its discretion under the Supreme Court Act to relieve against the penalty.

Elliott, K.C., for defendant, appellant. *Higgins and Morphy*, for plaintiff, respondent.

Clement, J.]

REX v. RULOFSON.

[Oct. 19.

Perjury—"Judicial proceeding."

An examination ordered by a judge to be taken before the registrar of the court ceases to be a "judicial proceeding" as defined by Crim. Code s. 171 (2) of Criminal Code, if the registrar after administering the oath leaves the room and the examination is proceeded with in his absence.

A false statement under oath made by a witness at such an examination, but in the absence of the registrar as aforesaid, is not perjury as defined by s. 170 of the Criminal Code: *Queen v. Lloyd* (1887) 56 L.J.M.C. 119 followed.

The learned judge directed the jury to bring in a verdict in favour of the prisoner.

Taylor, K.C., for Crown. *Craig and J. A. Russell*, for prisoner.

Flotsam and Jetsam.

The attempt of an ex-convict to get even with the Chief Justice of Nova Scotia by burning down the learned judge's house must be strongly deprecated. The fact that the Chief Justice was away when the ex-convict made the attempt renders the act a positively ungentlemanly one. This language may seem harsh, but it can be justified.—(Exch.). As a breach of good manners this was almost as objectionable as the action of the prisoner who ended the moral essay of the magistrate who was passing sentence upon him by threatening to shy his boot at the "old 'un's nob," if he didn't stop.

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LAW-MAKING IN ALBERTA.

Three years ago Alberta was admitted into Confederation. It was received not upon the "terms of the union" but practically upon its own stipulations. The country had reached that stage of development where it was in a position to demand "better terms" and get them. The government of the day was entrusted to the Hon. A. C. Rutherford who with a strong, common-sense cabinet, began at once the enactment of such legislation as the conditions of the country called for.

The early territorial legislation may have been more or less imperfect, but such as it was, it constitutes the superstructure upon which the new provinces are to-day building for the future. With the passing of the old regime, there passed the most stirring period in the annals of the West. A new epoch opened. The old order of things had to be garbed in new raiment, and the work is not yet finished. Expansion is the keynote of Western Canada, and where there is expansion the making of laws knows no end.

To the legislators of the old territorial parliament those of the new provincial legislature must ever feel indebted. The Hon. F. G. W. Haultain, who, for eighteen years, was Premier and Attorney-General, left to his successors a monumental legacy. It was he, more than any other, that brought order out of chaos, that established peace, order and good government in a country which was almost universally believed to be only a fit home for the Indian and the buffalo.

The first consolidation of the territorial statutes was made in 1898, and the next immediately after the provinces were granted autonomy. The consolidation of 1905 shews how assiduously our early legislators had wrought for the welfare of

the country over which they had been placed to govern. It gives us a compensation Act, the administration of estates, agricultural societies, arbitration, assignments, bills of sale, brands, coal mines, joint stock companies, controverted elections, insurance, irrigation, liens, liquor license, herding, partnerships, public health, schools, succession duties, Lord's Day, telephones, local districts and so on. The Municipal Telephone Act also went through that year, 1906. Under it Alberta has come to possess several hundred miles of long distance wires and a net-work of rural or domestic lines. It is the purpose of the government to bring, eventually, all parts of the province into touch with one another. Alberta prides itself on being the first province in Canada to adopt a system of government owned telephones.

Perhaps the greatest of all the legislation handed down to us has been the Judicature Ordinances. The Act provides a complete machinery, and save in the Small Debt procedure, it remains unchanged. The English practice is followed with a weather eye on the Ontario procedure. The best results have thus been obtained. The District Court and the Small Debt Acts place the administration of justice within easy reach of every section of the province. In the eastern provinces clients must come to justice; in Alberta, justice goes to the clients. In Nova Scotia, for instance, magistrates have almost wholly to do with the trial of small debt cases. In Alberta this function is discharged by the District Court judge, and this explains why court sits one week at Edmonton and the next, maybe, in a frontier village or away four or five hundred miles in the north country. A few weeks ago there was a sitting of the court at Fort McMurray, where the Athabasca and Clearwater rivers join streams to flow on to the Arctic ocean. It was the first occasion upon which the majesty of the law was exercised in those regions by a constitutionally appointed judge. The gold lace of the Royal Mounted Police was the wig of judicial authority to which the people there had been accustomed, but in these itineraries we see the beginning of the end. A quarter

of a century hence, perhaps not so long, and the barracks of the Mounted Police will be mementoes of the past. Indeed the prancing steed has already been turned toward his last trail.

The first year of the legislature put into force much legislation that was creative in character. Statutes were passed providing for the administration of justice by police magistrates, commissioners and notaries public were provided for, the Torrens system of land transfers was introduced and a Mechanics' Lien Act passed. Important statutes were also enacted with respect to the public services. In these we get the machinery for the government of the province, the conspicuous feature of which is the centralization of power at the Capitol. The Governor-in-Council and the Ministers do business direct with the remotest school district in the province. This is an arterial service quite unique in the administration of provincial affairs in Canada.

Alberta is primarily an agricultural province, and it is only natural that a good deal of the country's legislation should be directed in the interests of the farmer. The second session saw such measures enacted as made for the establishment of government creameries, an industry which has had remarkable success. The farmer was protected against noxious weeds, and his burden of taxation shifted to the railway corporations. The local improvement district Act was amended and so modified as to bring it into harmony with the growing requirements of the rural sections. The third year was devoted to what might be called "industrial" legislation. We have an Act respecting compensation to workmen for injuries sustained in connection with their employment. The coal mines Act was amended to provide for an eight hour day from bank to bank. The mechanics and literary institutes Act was passed to provide means for the intellectual improvement of men engaged in industrial pursuits. The drainage Act makes it possible to reclaim vast stretches of country now useless for farming purposes. Land thus obtained becomes the property of the local government, the public domains being vested in the federal authorities.

The charitable institutions have not been overlooked. Provisions have been made for the establishment of an industrial school for incorrigible boys and girls and a hospital is now in course of erection for the treatment of the insane. The farm system will be followed in both these cases.

Not the least among the important pieces of legislation passed by the province has been that providing for higher education. The old territorial government had in mind one university, but the setting apart of the two provinces rendered this scheme, however meritorious, impracticable. The University Act has already resolved itself into concrete form in that the University of Alberta was formally launched in September last, a large class of students from all different parts of the province being under instruction. In connection with the work of the college a university extension system of lecture courses has been adopted under which free lectures are given at the more important towns and cities. The founding of the University of Alberta is only one of the many footprints of progress found in Western Canada.

Alberta, although yet wrapped in swaddling clothes, has contributed a great deal to advanced legislation. It has set a pace worthy of the emulation of some of the older provinces. The province contains a cosmopolitan people, its reaches of territory are enormous, its interests are varied, its possibilities illimitable, and, it must be said to the credit of its present and past legislators, that the foundation stone has been well and truly laid.

J. GEDDIE MORRISON.

EMPLOYERS' LIABILITY TO WORKMEN.

At a recent meeting of the English Law Society held at Liverpool an interesting paper was read by Sir John Gray Hill in which he dealt exhaustively with the modern legislation in England with regard to compelling employers to make compensation to their employees, or, in case of their death, to their representatives, in respect of injuries sustained in the course of their

employment. He adduced strong evidence to shew that in many cases the law as it at present stands in England is not only unduly oppressive to the employer, but has also a reflex action fatally injurious to the very class it was intended to benefit. With the general principle that where a workman receives any injury through any negligence either of his employer or anyone standing in the employer's place in regard to the injured workman, the employer ought in justice to make compensation. We do not quarrel. The master having the benefit of the servant's labour should certainly bear some share of the personal risks and damages which that labour involves, and to throw the whole burden on the servant is neither just nor equitable. Legislation for the compensation of injured workmen started with that principle in England in 1880, and it was from the Act then passed that the Ontario Act was framed.

But while we in Ontario have patiently worked out that Act, and, on the whole, have found it a reasonable and sufficient protection to the workingman, in England they have cast the principle on which the Act of 1880 was founded to the winds, and have, in fact, made nearly all employers insurers of all servants doing manual labour, including domestic and agricultural servants, against any injury sustained by them in the course of their employment, entirely irrespective of whether it was due to any negligence of the employer, or to contributory negligence of the servant; so that nothing but the actual and wilful misconduct of the workman in himself causing the accident, will now exonerate the employer; and not only in case of death is the employer required to compensate the legitimate dependents of the deceased, but he is also in England required to make compensation to his illegitimate dependents! Legislation of this kind is nothing less than a pandering to a class which is supposed to be powerful in votes, regardless of justice to the rest of the community.

Under the present English statute it has been held that the representatives of a workman who happens to contract disease in the course of his work from which he dies, are entitled to compensation from the employers though there was no negli-

gence on the latter's part: *Brintons v. Turvey* (1905) A.C. 230. In that case anthrax was contracted from handling infected wool. But a workman who contracted typhoid fever from inhaling sewer gas in the course of his employment was held not entitled to recover against his employers: *Broderick v. London County Council*, 24 Times L.R. 822. An hostler while eating his dinner in the stable being bitten by the stable cat which occasioned blood poisoning was held to be entitled to recover against his master: *Rowland v. Wright*, 24 Times L.R. 852. A ship's steward, partially drunk, who returned to his ship by means of the cargo skid in order to escape the notice of his superior officers and in doing so fell down the hatch and was killed, was held to have met his death in the course of his employment and his employers were held liable to make compensation to his representatives: *Robertson v. Allan Line*, 98 L.T. 821.

Furthermore, a workman who undertakes to do work which he is physically unfit for, may render his employer liable to make compensation to his representative should he succumb while engaged in his work which would not be injurious to a man in normal health. For instance, if a workman in a weak condition engages to do the work of a stoker and is overcome by the heat so that he dies, his employer must, according to the English law, compensate his dependents legitimate and illegitimate: *Ismay v. Williamson*, Times, Aug. 1, 1906.

A workman may receive an injury which a surgical operation would remedy or remove, but if the workman be of a lazy disposition and prefers to continue to draw compensation in the character of a disabled workman, he may do so, and cannot be required to submit to an operation which any reasonable man would, in order to be restored to an efficient condition: *Rothwell v. Davis*, 19 Times L.R. 423.

The present state of the law on this subject in England has been found to give rise to no little fraud, and malingering on the part of workmen to the destruction of their honour and self-respect; and when to this is added a tendency on the part of employers only to employ men in the prime of life and to reject

all men who shew any sign of physical or mental weakness, it is not very difficult to see that the army of the unemployed is likely to swell. The conclusion seems inevitable, therefore, that this course of legislation is not after all so beneficial for the working classes as it was, no doubt, intended to be.

The promoters of this legislation it appears artfully suggested that its effect would be to relieve the poor rates, inasmuch as it was said the burden of supporting workmen injured or killed by accident and their families would now have to be borne by the employers, and not by the public at large, which was merely an ingenious piece of sophistry and an appeal to public selfishness which was only too easily swallowed; as though the public could prevent employers adding the additional cost of the insurance of their workmen to the price of the goods which they sell, and which the public have in the long run to pay. This class of employers are quite able, and we are quite sure do, as a matter of fact, take into account in fixing the price of their goods this additional burden which is thrown on them; but it is different with the small householder whose servant, through no fault or negligence on his part, falls and breaks her leg. He has to shoulder the burden of compensating her for her injury, without being able to call on anyone else to share it with him. Such legislation we should think is well calculated to have the effect of throwing a large class of domestic servants out of employment altogether.

The key-note of the Ontario Act, as we have intimated, is that in order to give rise to liability on the part of the employer the injury to the workman must arise from some negligence for which the master is responsible, whether it be in his plant, or works, or ways, or in the order of persons in authority to which the injured workmen was bound to conform. This seems as we have said a reasonable basis for such legislation, whereas that in England, which goes beyond, appears to be ill-conceived and detrimental to the class intended to be benefited, as well as unjust in principle. It is no wonder that Sir John Gray Hill's deliberate opinion is that the whole policy of the existing Work-

men's Compensation Acts in England is wrong, and that he has come to the conclusion that in the interests of the working classes the two later English Acts should be repealed. He remarks that it is only to a comparatively limited class that the manifold imperfections of those Acts are known, viz., to the legal profession to whose mill they bring grist in the way of litigation, to the medical profession who also pecuniarily profit thereby, and to the insurance companies which also make business thereout; but the public in general is in the dark. His remarks, therefore, are disinterested and deserve attention not only in England, but in every other country where such litigation is contemplated.

**LIABILITY OF MANUFACTURERS OF FOOD PRODUCTS
FOR INJURIES TO THIRD PERSONS.**

An important decision has recently been given by the Court of Error and Appeal, New Jersey, U.S., on this subject (*Tomlinson v. Armour*). The plaintiff brought an action against the well-known pork packers in Chicago, Armour & Co., for damages in respect of his purchase of some canned meat, which, as he alleged, was so carelessly, negligently and improperly put up as to cause deleterious and poisonous results; the plaintiff, having eaten a piece of ham taken from one of these cans had been taken ill from ptomaine poison. The Supreme Court of the State held that there was no liability on the part of the defendants, there being at common law no implied warranty by a manufacturer or dealer as to the wholesomeness of food supplied, and that, assuming a different rule to exist in case of such dealer and a consumer, yet the consumer in the absence of a statute could not hold a manufacturer or original vendor to a higher degree of duty than that cast upon him by common law with respect to his own vendee.

The Appellate Court reversed this decision. Pitney, C., who delivered the judgment of the court thus concludes his judgment: "Upon both reason and authority we are clearly of the opin-

ion that the declaration before us sets up a good cause of action. The fact that the defendant was the manufacturer, presumably having knowledge, or opportunity for knowledge, of the contents of the cans and of the process of manufacture; that it put the goods upon the market for sale by dealers to consumers, under circumstances such that neither dealer nor consumer had opportunity for knowledge of the contents; the fact that the goods were thus manufactured and marketed under circumstances that imported a representation to intending purchasers that they were fit for food and beneficial to the human body; that in the ordinary course of business there was a probability (it being, indeed, the very purpose of the defendant) that the goods should be purchased, and used by parties purchasing, in reliance upon the representation; and that the defendant negligently prepared the food so that it was unwholesome and unfit to be eaten, and poisonous to the human body, whereby the plaintiff was injured—make a case that renders the defendant liable for the damages sustained by the plaintiff thereby.”

There is given in the *Central Law Journal*, where the case is reported, a valuable note discussing the question under two heads. The first of these is as to an implied warranty by a manufacturer in the sale of injurious foods, etc. The writer deals with it as follows:—

“The decision in the principal case was decided in the Court of Errors upon a different ground from that which was considered by the Supreme Court below. Actions for negligence are for breaches of duty. Actions on contracts are for breaches of agreement. Hence, the limits of liability for negligence are not the limits of liability for breaches of contracts and actions for negligence, often accrued where actions upon contracts did not arise and vice versa.

“In the principal case, the court is careful to say that the question whether or not a liability would exist upon an implied warranty is one that they do not decide. In the court below (65 Atl. 833) the court lays down the doctrine that at common law on a

sale of food articles between a dealer in provisions and a retailer, there was no implied warranty of wholesomeness. Assuming that a different rule exists in a case of the sale by such a dealer to a consumer, the latter, in the absence of statute cannot hold the original vendee to a higher decree of duty than that cast upon him by the common law, with respect to his own vendee. And further that to select out of the entire class of transactions covered by a well established rule of the common law a single mode for the imposition of a different rule, based upon considerations of public welfare, is essentially a legislative function and that therefore the facts set forth in the declaration that the defendant had packed diseased ham in a can and had sold it to a retail dealer, of whom it was bought by plaintiff, who from eating a piece of such ham became sick, that these facts do not constitute a cause of action. Whether or not, as has been before stated, this rule of the court below was a correct statement of the law, the higher court does not pass upon.

“While the English authorities would seem to support the doctrine that there is no implied warranty in such a case, yet that great old master of common law, Blackstone, vol. 3, p. 165. laid down the doctrine that in contracts for provisions it was always implied that they are wholesome, and that if they are not wholesome, an action on a case for deceit lies against the vendor. He cites no authority for this proposition and it may be safely assumed that it probably appeared to him to be a doctrine founded upon sound common sense, and public policy, so manifestly just that citations were not required. That there is no implied warranty, it is said in the American & English Encyclopedia of Law, second edition, page 1237, is the rule adopted in the United States, at least to this extent that there is no implied warranty of soundness or wholesomeness arising from sale of food provisions to a dealer or middleman, who buys on the market not for consumption, but for sale to others. As illustrations of this doctrine a case is given where a live cow is sold by a farmer to a retail butcher, there being no implied warranty that she is fit for food, although the seller knows that the animal is bought to be

cut up for meat or immediate domestic consumption. *Howard v. Emerson*, 110 Mass. 320. And in another case, where a drover sold beef cattle to a butcher, it was held that he did not impliedly warrant that they were not bruised. But even the doctrine announced in the two latter illustrations, is not followed by all courts or at least has been somewhat limited. Thus, in the case of *Sinclair v. Hathaway*, 57 Mich. 60, it was held that a baker who sold bread to a peddler, whom he knew was to retail it, impliedly warranted the bread to be wholesome, and while the doctrine of this case seems to be somewhat in the minority, yet it seems to express the true rule which ought to be, if it is not, supported by authority, i.e.: That where a person sells an article to another, which he knows or ought to know is to be used for a particular purpose, he impliedly warrants no matter whether the purchaser is a wholesaler, retailer, or a consumer, that the article is fit for the purpose for which he knows it will be used. Especially is this true where the seller knows or ought to know that the article is not fit for the use intended. If a person sold cattle to a butcher, which were diseased, not knowing that fact, or having no means of knowing such fact, then there might possibly be some excuse for holding that there is no implied warranty, but where the seller prepares the article himself, then he knows or should know, how the article is prepared, and if not properly prepared, there certainly would be no injustice in holding that he is responsible, on an implied warranty. In the Encyclopedia before referred to, page 1238, the doctrine is laid down that in all cases in the sales of food by a retail dealer for domestic use, an implied warranty exists, that they are fit for use and wholesome. However upon this doctrine there is a distinction drawn where the purchaser has no right to assume that the middleman who is acting as seller, knew the quality of the article. *Julian v. Laudenberger*, 16 Misc. (N.Y.) 646. Even in such a case it seems that the retailer ought to be held responsible because if he does not know, he ought to know, whether the article is fit for use."

The second head taken by the writer of the article above referred to deals with the general rule as to contractual liability

of manufacturers of injurious foods to consumers, in the following language:—

“It is a general rule, that a contractor, manufacturer or vendor is not liable to third parties, who have no contractual relations with him, for negligence in the construction, manufacture or sale of the articles he handles. Where this doctrine is applied it is because the makers, vendors or furnishers owed no duty to strangers, in their contracts of construction, sales or furnishing: Examples of this holding are as follows: A stage coach,—*Winterbottom v. Wright*, 10 Mees. & W. 109; a leaky lamp,—*Longmeid v. Holliday*, 6 Exch. 764, 65; a defective chain furnished one to load stone,—*Blakemore v. Bristol & E.R. Co.*, 8 El. & Bl. 1035; an improperly hung chandelier,—*Collins v. Selden*, L.R. 3 C.P. 495, 497; an attorney's certificate of title,—*National Sav. Bank v. Ward*, 100 U.S. 195, 204, 25 L. Ed. 621, 624; a defective valve in an oil car,—*Goodlander Mill Co. v. Standard Oil Co.*, 27 L.R.A. 583, 11 C.C.A. 253, 259, 24 U.S. App. 7, 63 Fed. 401, 406; a porch on a hotel,—*Curtin v. Somerset*, 140 Pa. 70, 12 L.R.A. 322, 21 Atl. 244; a defective side saddle,—*Bragdon v. Perkins-Campbell Co.*, 30 C.C.A. 567, 58 U.S. App. 1, 87 Fed. 109; a defective rim in a balance wheel,—*Loop v. Litchfield*, 42 N.Y.S. 351, 359, 1 Am. Rep. 513; a defective boiler,—*Losee v. Clute*, 51 N.Y.S. 494, 10 Am. Rep. 623; a defective cylinder in a threshing machine,—*Heizer v. Kingsland & D. Mfg. Co.*, 110 Mo. 605, 617, 15 L.R.A. 821, 19 S.W. 630; a defective wall which fell on a pedestrian,—*Daugherty v. Herzog*, 145 Ind. 255, 32 L.R.A. 837, 44 N.E. 457; a defective rope on a derrick,—*Burke v. De Castro & Sugar Ref. Co.*, 11 Hun. 354; a defective shelf for a workman to stand upon in placing ice in a box,—*Swan v. Jackson*, 55 Hun. 194, 7 N.Y.S. 821; a defective hoisting rope of an elevator,—*Barrett v. Singer Mfg. Co.*, 1 Sweeny 545; a runaway horse,—*Carter v. Harden*, 78 Me. 528, 7 Atl. 302; a defective hook holding a heavy weight in a drop press,—*McCaffrey v. Mossberg & G. Mfg. Co.*, 23 R.I. 581, 55 L.R.A. 822, 50 Atl. 651; a defective bridge,—*Marvin Safe Co. v. Ward*, N.J.L. 19; shelves in a dry-goods store whose fall injured a customer,—*Burdick v. Cheadle*,

26 Ohio St. 393, 20 Am. Rep. 767; a staging erected by a contractor for the use of his employees,— *McGuire v. McGee* (Pa.), 13 Atl. 551; defective wheels,—*J. I. Case Plow Works v. Niles & S. Co.*, 90 Wis. 590, 63 N.W. 1013.

“To this general doctrine, Federal Circuit Judge Sanborn, in *Huset v. Case Threshing Machine Co.*, 120 Fed. 865, says that there are three exceptions. The first is that an act of negligence of a manufacturer or vendor, which is eminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of the article intended to preserve, destroy or affect human life, is actually to third parties who suffer from the negligence, citing: *Dixon v. Bell*, 5 Maule & S. 198; *Thomas v. Winchester*, 6 N.Y. 397, 57 Am. Dec. 455; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Elkins v. McKean*, 79 Pa. 493, 502; *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715, 1 N.E. 154; *Perers v. Johnson*, 50 W. Va. 644, 57 L.R.A. 428, 41 S.E. 190, 191. The second exception, is that an owner’s act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner’s premises, may form the basis of the action against the owner, citing: *Coughtry v. Globe Woolen Co.*, 56 N.Y. 124, 15 Am. Rep. 387; *Bright v. Barnett & R. Co.*, 88 Wis. 299, 26 L.R.A. 524, 60 N.W. 418, 420; *Heaven v. Pender*, L. R. 11 Q.B. Div. 503; *Roddy v. Missouri P. R. Co.*, 104 Mo. 234, 241, 12 L.R.A. 746, 15 S.W. 112. The third exception to the rule is that one who sells or delivers an article which he knows to be eminently dangerous to life or limb of another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated whether there were any contractual relations between the parties or not, citing: *Langride v. Levy*, 2 Mees. & W. 519, 4 Mees. & W. 337; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64, 67; *Lewis v. Terry*, 111 Cal. 39, 31 L.R.A. 220, 43 Pac. 398.

“The principal case rather comes under the first exception made to the general rule, although it might likewise be founded upon the third exception, but whether founded either upon the first or third exception, there is no doubt but what the doctrine

sustained by the Court of Errors in the principal case is correct and sound. Especially is this true when it is based upon the doctrine that where a manufacturer produces an article of food that he owes a duty to the public or any purchaser that the article is wholesome and fit for consumption, but it seems to the writer that the principal case might not only be upheld upon the doctrine that the manufacturer owes a duty of that character, but it might also be sustained upon the doctrine that in such cases there is an implied warranty upon the part of the manufacturer that the article is of the character it should be and that this warranty is for the benefit of whoever may ultimately use this article for the purpose for which it was manufactured and that not only the retailer, or the middle man, would have a right of recovery against the manufacturer, that it was not such as it should be, but that the consumer while having no contractual relations with the manufacturer would have a right to recover from the manufacturer on an implied warranty. And that such right of action directly against the producer, would be justified further to prevent a circuitry of action. If the retailer is responsible, as the matter of justice, he should be permitted, being innocent in the matter, to recover from the person who sold him the goods, and so on ad infinitum."

LAW OF MOTOR CARS.

Under the law of motor cars as at present developing an automobile is apparently a carriage or not a carriage according to circumstances. The New Jersey Court of Chancery recently held in *Trenton v. Toman*, 70 Atl. Rep. 606, that an automobile is a "carriage" within the meaning of a covenant in a deed reserving a strip of land for a carriage way forever. The Vice-Chancellor said: "No particular kind of carriage or waggon is mentioned. Although automobiles had not been invented at that time the easement was created, yet the language of the grant is unrestricted, and must be held to include any vehicle on wheels then or thereafter to be used. A carriage has been defined

to be 'that which carries, especially on wheels; a vehicle.' " As noted on a previous occasion (ante, p. 680), an automobile is not a carriage within the meaning of a statute requiring towns to keep their highways reasonably safe and convenient for travellers with their horses and carriages, and that the town is not liable for failure to make any special provision for automobiles if its highways are reasonably safe and convenient for travel generally.

UNFRUITFUL LAWSUITS.

Many men, level-headed enough about other things, seem to lose their wits entirely when they get tangled up in a lawsuit. In a case recently concluded in the German courts a Berlin business man paid out over \$900 to recover the value of a five-cent postage stamp, and now everybody is laughing at him because he didn't even get the stamp back. It seems as if this claimant had justice on his side, too; he had written a polite letter asking for an address and enclosing postage for reply. Failing to get an answer, he sued for the stamp.

The famous Missouri watermelon case was just as trifling and even more disastrous. The seed was planted on one farm, but the vine crept through a crack in the rail fence and the melon grew on the outer side. Both farmers claimed it, and instead of seeing the joke they went to law. To add to the puzzle of ownership an additional complication, the fence was on a county line, and a question of the jurisdiction, of course, was involved. The farmers bankrupted themselves without deciding the question of ownership. The melon worth about ten cents in the first place, had disappeared long before.

The Iowa case which concerned the identity of a red and white heifer calf, was equally disastrous, says the Chicago "Tribune." It is said that subpoenas were issued for more than two hundred witnesses, who attended court after court and received their fees and mileage. The question of who owned the calf grew from a joke into a neighbourhood tragedy. Per-

fectly honest men and women took the witness stand and swore against each other. So great was the puzzle that jury after jury was unable to agree, and no man knows to this day whether there were two spotted calves that looked just alike, or whether one man tried to steal the other's calf. After they had spent all their money in litigation the rival owners met one day and tossed a coin to settle the case.

One of the celebrated French cases was over a two-cent toy balloon, and the litigants were Baron de Sibert and the Paris Metropolitan Railway. The balloon belonged to the baron's little girl, and the railway employees, on account of some rule they felt obliged to enforce, would not permit it to be brought into the passenger car. The baron stormed and threatened, but the guard was obdurate, and the toy was left behind while the child wept. The next day the nobleman sued the company for the two cents.

Some of the smartest lawyers in Paris were engaged in the case. It was proved that the balloon was filled with gas, and that it was likely to explode at any time, and the wise court held that even if its explosion could not possibly be attended by danger, it might "create a panic among the passengers," and the decision was against the baron. He spent hundreds of dollars trying to get even with the company, and the more he lost the less satisfaction he obtained.

The most expensive lawsuit in the world is said to have been that over the will of Antonio Traversa, a merchant who lived in Milan. He left a fortune of \$3,000,000, and there were a large number of heirs with conflicting interests. The case was in the different courts of Italy for years and the 105 lawyers engaged in it ran up costs aggregating more than \$2,000,000. The estate lost in value, too, during the contest; so that the winning heirs found themselves with a small sum to their share when the final decision was rendered.

One of the most persistent complainants on record was an aged Belgian lawyer, who once tried to ride in an Antwerp street car, or tramway, on a ticket which he maintained was

good but which the company refused to honour. He brought suit against them next day and the court decided against him. He paid his costs, only a trifle, and the next time he got on the car he offered the same ticket. It was refused, and again he haled the company into court.

As he was his own lawyer and the ticket was his witness, it was not an expensive course of litigation for him, but it cost the company something. As often as he would be thrown out of court he would offer the ticket again and establish grounds for a new case. At last the tramway company saw a great light. They accepted the ticket one day and let the lawyer ride.—*Law Notes*.

THE FIDUCIARY RELATION OF A PROMOTER.

A promoter bears a fiduciary relation both to the corporation and to the subscriber. As regards the corporation his position of advantage in dealing therewith creates this relation. 1 *Morawetz*, Priv. Corp, s. 545. His duty is to disclose the facts of such transactions in behalf of the corporation as it may adopt. *Yale Gas Stove Co. v. Wilcox* (1894) 64 Conn. 101. There is, however, no obligation to disclose dealings made before he became a promoter. *McElhenny's Appeal* (1869) 61 Penn. St. 188. The remedies open to a corporation for a breach of this obligation are rescission, or a suit in equity to recover the secret profits. *Cortes Co. v. Thannhauser* (1891) 45 Fed. 730.

Among cases in which a corporation has sought to recover profits made by promoters from a sale of property, clearly the sale may be avoided or secret profits recovered if the majority stockholders without knowledge of the facts adopted the transaction. Even though the majority knew the facts, if their action be not *bonâ fide* the corporation can recover by a minority stockholder's suit. *Hebgen v. Koeffler* (1897) 97 Wis. 313. But the promoters are not liable where they constitute the sole stockholders during the life of the corporation, *Salomon v. Salomon & Co.*, [1897] L.R. App. Cas. 22, or where, having organized

and taken property with the view of continuing sole stockholders, after a considerable interval of time issue new stock to the public. *In re British, etc., Box Co.* (1881) L.R. 17 Ch. Div. 467. Fraud cannot be predicated of such a dealing. Midway, lie two groups of cases. First, the promoters or their dummies become incorporators or directors of the newly formed corporation, make the sale before complete organization, and then call for subscriptions from outsiders. Here they have generally been held liable. *Hayward v. Leeson* (1900) 176 Mass. 310; *Erlanger v. New Sombrero, etc., Co.* (1878) L.R. 3 App. Cas. 1218. Second, the promoters, having designedly issued a few shares of stock to themselves, adopt the sale, and immediately offer the remainder to the public. In a case of the latter sort the United States Supreme Court has recently held, contrary to the view in England, *Society of Practical Knowledge v. Abbott* (1840) 2 Beav. 559; (*semble*), *In re British, etc., Co.* (1881) L.R. 17 Ch. Div. 467, and in Massachusetts on the same facts, *Old Dominion, etc., Co. v. Bigelow* (1905) 188 Mass. 315, that the corporation has no remedy. *Old Dominion Copper Mining and Smelting Co. v. Lewisohn* (1908) 28 Sup. Ct. Rep. 634. The decision stands on the ground that, since all the stockholders for the time being knew the facts, their unanimous act cannot be a fraud upon the corporation. The court properly distinguishes on its facts *Erlanger v. New Sombrero, etc., Co.*, *supra* (belonging to the first group), though its reasoning would undoubtedly cover the principal case.

Two other courses were open to the court. In the first, the court would be called upon to exaggerate the accepted distinction between the corporate entity and its stockholders. It was suggested in *Society of Practical Knowledge v. Abbott*, *supra*, and argued in *Salomon v. Salomon & Co.*, *supra*, that the corporation is an entity so distinct, that it may be defrauded by the unanimous act of its stockholders. Hence, for a fraud upon the corporate interests, a new stockholder, like a minority stockholder, could sue in the name of the corporation. The argument is specious in assuming the interests of the corporation distinct

from those of its stockholders. No court, it is believed, is prepared to go to this extent. It would lead to inextricable difficulties in the determination of the corporate interests, and to the result, rejected in *Salomon v. Salomon & Co.*, supra, that the receiver of a corporation, whose stock was exclusively owned by the promoters during the entire life of the corporation, could recover profits made by them in a sale of their property to the corporation.

The court might more properly have looked beneath the technical distinction between the first and second groups of cases, and, viewing the transactions as in essence the same, have administered equitable relief. Cf. *Erlanger v. New Sombrero, etc., Co.*, supra. This apparently is the underlying basis of the Massachusetts decision. But that court professed to adopt the business view that the real corporation was one composed of the contemplated stockholders and that the knowledge of the promoter before the completion of such a corporation was not the knowledge of the entity. This theory, however, is logically open to criticism, and is unnecessary to support the true ratio decidendi. It might also, perhaps, be argued that, under the circumstances of the principal case, the corporate interests should be determined by the interests of the contemplated stockholders as well as by those of the present stockholders. This would be a modification of the extreme entity theory, and perhaps represents the view of the English Court of Appeals in *In re British, etc., Box Co.*, supra, holding that an issue of stock to the public directly after the adoption of the transaction would be conclusive evidence of fraud on the corporation. It could hardly be regretted had the Supreme Court, exercising its equitable powers, brushed aside its technical argument and allowed the corporation relief.

It is probable, however, that, on the facts of the case, the subscribers had an individual remedy against the promoters. Though in most cases in which personal relief has been given the subscriber, the facts shew misrepresentation, the broad ground of decision is that the promoter does not treat with the subscriber at arm's length, but in a fiduciary relation by virtue of which

the promoter is bound to disclose all the facts. *Brewster v. Hatch* (1890) 122 N.Y. 349; *Teachout v. Van Hosen* (1888) 76 Ia. 113. The duty of the promoter to the subscriber is based upon the confidence the latter is likely to repose in the organizer of a corporation. 1 Morawetz, Priv. Corp. s. 545. That duty should therefore continue so long as he in effect acts in such a capacity, and should exist in the principal case, despite the fact that the promoter had also become a stockholder. If this be true, the refusal of the Supreme Court to relax sound legal theory in order to grant an additional remedy, may be supported.—*Columbia Law Review*.

Complaints have been made both in this country and elsewhere that judges are occasionally not as prompt as they might be in the disposition of causes heard before them. A curious provision of the California constitution has recently been brought into notice. It is this, that the salaries of Supreme Court judges may be withheld when a decision in any case argued and submitted to them is not reached in ninety days, and there is to be no more pay for the members of the Court until disposition is made of that case. The practical operation of such a provision would be greatly facilitated if the portion of salary withholden from the judge were to go to the litigant whose cause had not received attention within the specified time. We would suggest that the judges should consider and draft an appropriate enactment based on the above suggestion.

The meaning of the expression "an ordinarily prudent man" recently came up for adjudication in the Supreme Court of Vermont. The question of contributory negligence having arisen, the jury were told that if they could say that the plaintiff exercised the care and prudence of an ordinarily prudent man he was not chargeable with contributory negligence. This standard was held on appeal to be too low to meet the requirements of the law: *Drown v. New England Telephone Co.*, 70 Atl. Rep. 599.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

WILL—CONSTRUCTION—LEGACY—FORFEITURE CLAUSE—SUBSTITUTED LEGACY—INCIDENTS OF ORIGINAL LEGACY WHETHER APPLICABLE TO SUBSTITUTED LEGACY.

In re Joseph, Pain v. Joseph (1908) 2 Ch. 507. The Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) have reversed the decision of Eve, J., upon the construction of the will in question in this case (1908) 1 Ch. 599 (noted ante, p. 354). The point it may be remembered was whether a substituted legacy was subject to the same condition as was attached to the original legacy for which it was substituted. In this case the original legacy was subject to a condition of forfeiture in the event of the legatee marrying a Christian. The substituted legacy was not expressly made subject to that condition, but Eve, J., held that it was impliedly so, upon a proper construction, but from this view the Court of Appeal dissent on the ground that the substituted legacy was given to other persons besides the original legatee, and that the legacy in question was therefore not strictly a substituted legacy, but a new and independent one.

SEWERS—DRAINAGE—STATUTORY POWERS—NUISANCE—INJUNCTION.

Price's Patent Candle Co. v. London County Council (1908) 2 Ch. 526. The plaintiffs in this case were the owners of the banks of a creek and complained that the defendants had for the purpose of relieving their sewers erected a pumping station at the mouth of the creek for the purpose of pumping when necessary the storm overflow into the creek, whereby sewage matter contained in such storm water adhered to the banks and created a nuisance, and they claimed an injunction. The sewage works were constructed and carried on under statutory authority, but the statutes expressly provided that they were to be carried on so as not to create a nuisance; and it was held by Neville, J., that the defendants could not justify their acts on the ground that they were carrying out their statutory obligations, and that the plaintiffs were entitled to an injunction as prayed; and the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) affirmed his decision.

POWER—GENERAL TESTAMENTARY POWER—EXECUTION OF POWER
—EXPRESS REFERENCE TO POWER REQUIRED—GENERAL REFERENCE TO ALL TESTAMENTARY POWERS.

In re Lane, Belli v. Lane (1908) 2 Ch. 581. In this case the question was whether a power had been duly executed. A fund was settled in trust for such persons as the settlor should by will, "expressly referring to this power," appoint. The settlor made a will disposing of all property "over which I shall have any power of disposition by will." Eady, J., held on the authority of *In re Waterhouse* (1907) 96 L.T. 688, 98 L.T. 30, and *In re Roll* (1908) W.N. 76, that this was an "express reference" to the power, and therefore that it was well executed. *In re Teapes*, L.R. 16 Eq. 442, was distinguished on the ground that the power there in question was a special limited one.

HIGHWAY—DEDICATION—USER BY PUBLIC—LAND IN SETTLEMENT
—TENANCY FOR LIFE WITH REMAINDER IN FEE—PRESUMPTION
—ACQUIESCENCE.

Farquhar v. Neubury Rural District Council (1908) 2 Ch. 586. In this case the question was whether or not a roadway had been dedicated as a public highway. The land formed part of an estate which was settled to the use of one Dr. Penrose for life, with remainder in fee to one Eyre. In 1842 Eyre, Penrose being still alive, was in the actual occupation of the estate, and laid out the road in question. Penrose was no party to this, and survived till Feb., 1851. In 1849 Eyre resettled the estate whereby he became tenant for life with remainder over to other persons in fee. Eyre consented to the user of the road in question by the public, and in 1851, before the death of Penrose, had signed a minute in the vestry book whereby the road was declared to be a public road. Public money was from time to time expended in the maintenance of the road. In these circumstances Warrington, J., held that there had been an effectual dedication of the road as a highway.

TRADE UNION—RIGHT TO SUE—BRANCH UNION—SECESSION OF
BRANCH UNION—RESOLUTION FOR DISTRIBUTION OF FUNDS—
ULTRA VIRES—RELIEF GRANTABLE TO TRADE UNION—JURISDICTION—
TRADE UNION ACT, 1871 (34-35 VICT. c. 31) s. 4 (3A)
—(R.S.C. c. 125, s. 4(1)).

Cope v. Crossingham (1908) 2 Ch. 624 was an action brought by the officers of a trade union against a branch union. The

latter had seceded from the main body represented by the plaintiffs and had refused to pay over to the central body the funds of the branch, as required by the rules of the society, and had passed a resolution to distribute the funds amongst the members of the branch. The plaintiff claimed a declaration that this resolution was ultra vires of the branch, and an injunction to restrain the defendants from carrying it into effect, and they also claimed judgment for the payment of the money to the plaintiffs. Eve, J., held that the plaintiffs were entitled to the declaration and to an injunction if necessary, but not to an order to pay over, because in his opinion the jurisdiction of the court was excluded by reason of the Trade Union Act, 1871, s. 4 (3a) (R.S.C. c. 125, s. 4 (i)), which precluded the court from entertaining an action with the object of inter alia providing benefits to members. He therefore made a declaration that the distribution of the funds in accordance with the resolution would be ultra vires, and contrary to the rules of the society, and that the defendants hold the funds upon trust to apply the same in accordance with the rules of the society; and gave leave to apply generally.

PARTITION ACTION—ORDER FOR SALE—CONVERSION OF REALTY—
DEATH OF PERSON ENTITLED BEFORE SALE—DEVOLUTION OF
SHARE.

In re Dodson, Yates v. Morton (1908) 2 Ch. 638. This was a partition action in which an order for sale had been made, but before it was carried into execution, one of the parties interested, and who was sui juris, died intestate, and the question arose whether his share devolved as realty or personalty. Eve, J., held that from the date of the making of the order for sale, a conversion was effected, and thenceforth the estate must be regarded as personalty, and that the share of the deceased accordingly devolved upon his next of kin.

BANKRUPTCY—LANDLORD AND TENANT—DISCLAIMER OF LEASE BY
TRUSTEE—MORTGAGE BY DEMISE OF PART OF LEASEHOLD—
VESTING ORDER.

In re Holmes (1908) 2 K.B. 812, although a bankruptcy case, calls for a brief notice, inasmuch as it illustrates the remedy provided in England in a case for which none seems to exist under our law in Ontario. The facts were that a bankrupt was entitled

to a leasehold four-fifths of which he had mortgaged by way of demise, and the remaining one-fifth was unmortgaged, the whole premises were subject to a rent of £150. The trustee in bankruptcy disclaimed the lease, whereupon the mortgagee of the four-fifths applied for a vesting order to vest the bankrupt's interest in the lease including the unmortgaged one-fifth part in him. The application was resisted by the lessor, who claimed that the bankrupt's interest in the one-fifth part should be vested in him, to which the mortgagee objected that to do so would have the effect of leaving the four-fifths liable for the whole rent. The judge of the County Court to whom the application was made, granted the order as asked by the mortgagee, and Bigham and Jelf, JJ., affirmed his decision. We do not think any provision is to be found to meet such a case either in our Winding-up Acts, or in the Assignments and Preferences Act (R.S.O. c. 147).

BANKRUPTCY—PARTNERSHIP—BREACH OF TRUST—DIRECTOR OF COMPANY AND MEMBER OF PARTNERSHIP—MISAPPROPRIATION BY PARTNERSHIP OF COMPANY'S ASSETS—PROOF AGAINST FIRM'S AND INDIVIDUAL PARTNER'S ESTATES.

In re McFadyen (1908) 2 K.B. 817 is another bankruptcy case, which we also think deserving of attention. McFadyen, the bankrupt, was a director of the Vizianagaram Mining Co., and also a member of a firm of P. McFadyen & Co., which consisted of himself and one Arbuthnot. This firm were the general managers and agents of the company. Certain bills of lading for ore of the company which came to the hands of P. McFadyen & Co., were misappropriated by McFadyen, the bankrupt, to the extent of £13,000. The mining company lodged a proof for £13,000 against the joint estate of P. McFadyen & Co., and also a proof for the same amount against the separate estate of McFadyen. Bigham, J., rejected the proof against the separate estate, but the Divisional Court (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) considered that he had erred and reversed his decision, and in doing so their Lordships took occasion to emphasize the fact that the liability for a breach of trust is founded on contract and not on tort, and that the property in question having actually come to the hands of a person filling the position of a director he became as to it a trustee, notwithstanding that at the time he also filled the dual position of an agent.

SAVAGE DOG—SCIENTER—LIABILITY OF OWNER OF DOG—MASTER AND SERVANT—SCOPE OF EMPLOYMENT—REMOTENESS OF DAMAGE.

In *Baker v. Snell* (1908) 2 K.B. 825 the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) have affirmed the judgment of the Divisional Court (1908) 2 K.B. 352 (noted ante, p. 531) whereby a new trial was ordered. Kennedy, L.J., however, thinks that the intervening criminal act of a third person may in some cases exonerate the keeper of a vicious animal for damages occasioned thereby.

LIBEL—TRADE PROTECTION SOCIETY—MERCANTILE AGENCY—COMMUNICATIONS BY MERCANTILE AGENCY TO CUSTOMERS NOT PRIVILEGED—PRIVILEGE FOUNDED ON GENERAL INTEREST OF SOCIETY.

Macintosh v. Dun (1908) A.C. 390 is an important decision on the subject of the liability of mercantile agencies for libel in respect of communications made by them to their customers in the course of their business. The action was brought in Australia, and at the trial the plaintiff obtained a verdict and judgment in his favour, the Full Court in New South Wales ordered a new trial, and the High Court of Australia set that order aside, and directed judgment to be entered for the defendants, holding that the communication was privileged. The Judicial Committee of the Privy Council (Lord Loreburn, L.C., and Lords Ashbourne, Macnaghten, Robertson, Atkinson and Collins) reversed both orders, and gave judgment for the plaintiff on the ground that the communication which had been found to be injurious to the plaintiff, could not be said to have been made in the general interests of society, in which case it would have been privileged, but was made from motives of self interest by the defendants, who, for the benefit of a class, traded for profit in the characters of other persons, and who offered for sale information as to their credit, etc., which is not privileged, however carefully and cautiously it may have been obtained, and for which they were liable in damages if it proved to be defamatory. In arriving at this conclusion their Lordships declined to follow the decision of the New York Court of Appeals in *Ormsby v. Douglas* (1868), 37 N.Y. 477. Some other American cases may also be found referred to in vol. 29 of this Journal, p. 516, where it was held that such communications if made to actual

creditors of the person libelled, may be privileged, but not if made generally to all customers of the agency. This case would seem to be a very fitting illustration of the value of an appeal to His Majesty in Council, but for the ruling of the Privy Council the mercantile community in Australia would have been left to the tender mercies of the mercantile agencies.

SHIP—BILL OF LADING—CONSTRUCTION—"PORT INACCESSIBLE BY ICE"—"ANY OTHER CAUSE"—EJUSDEM GENERIS—ERROR IN JUDGMENT OF MASTER.

Knutsford v. Tillmans (1908) A.C. 406 may be well cited as a case of exceptional judicial despatch. The action is known in the courts below as *Tillmans v. Knutsford*, the decision of the court of first instance (1908) 1 K.B. 185 is noted ante, p. 225, and that of the Court of Appeal (1908) 2 K.B. 385 is noted ante, p. 531, and we have now the decision of the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, James and Dunedin), all within a year. The case, it may be remembered, turns upon the construction of a bill of lading, and whether it afforded the shipowners a sufficient excuse for not delivering the goods covered thereby. The clause relied on by the defendants exonerated them from delivery at the port of discharge in case it should be inaccessible on account of ice, blockade or interdict, or if entry and discharge at such port should be deemed by the master unsafe in consequence of war disturbance or other cause, and the ship owners were not to be liable for any error of judgment of the master. On arriving at the port of discharge, the ship was prevented from entering by ice, and the master after waiting three days left without making any further effort to enter and landed the goods elsewhere. It was shewn that other ships had entered the port at this time. The courts below held that the defendants were not exonerated from delivering the goods, and the House of Lords affirms that decision and holds that the words "inaccessible" and "unsafe" must be read reasonably and with a view to all the circumstances; and that the words "or any other cause" must be read as being ejusdem generis with war or disturbance, and that as a matter of fact the master was not justified in not delivering the goods at the port for which they were shipped, merely because the port was for three days only inaccessible on account of ice; and that the master never had exercised his judgment within the meaning of the clause relating to errors of judgment on his part.

Correspondence.

REPORTS AND REPORTING.

To the Editor, CANADA LAW JOURNAL:

SIR,—It must be generally admitted that a report of a decision to be of any service to the profession ought distinctly to exhibit the point decided. It ought not to be left to inference, but should be plainly and explicitly expressed. If it involves the overruling of a decision of another judge, it also ought to exhibit distinctly what that decision was. I am inclined to think that these rules are not very well observed in the report of the recent decision in *Cole v. Pearson*, 17 O.L.R. 46. This was an appeal from a judge of a County Court on a question arising under the Mechanics' Lien Act, and the report fails to shew precisely what the learned County Court judge's decision was, or in what particular respect it was held to be erroneous. According to the statement of the Appellate Court, as to what he decided it is hard to see in what respect he was thought to have erred. The question at issue was on what principle the percentage is to be calculated in favour of wage earners having a charge on the percentage required to be retained by the owner where the contract is not carried out by the contractor. It is said, "His Honour held that he had to consider only the value of the work done and materials provided under the contract at the time the contractor abandoned it, and thought that it was so held in *French v. Russell* (1897) 28 Ont. 215," but whether in ascertaining the value of such work and materials he adopted some other basis of value than that of the contract prices is nowhere stated. The head note states that "it was contended that section 14 (3) lays down a rule for wage earners in a case in which the contract has not been completely fulfilled, different from the rule in any other set of circumstances, and that the only thing to be looked at is the value of the work done and materials furnished by the contractor." But what that

different rule was, does not appear unless it is to be found in the words "that the only thing to be looked at is the value of the work done." But that is not a different rule or an improper rule as far as it goes. The question really was on what basis is the value of such work and materials to be estimated? Is it to be the contract prices, or is the owner to be at liberty to shew that the work, is not really worth what he agreed to pay for it, or on the other hand, may the wage earner shew it is actually worth a great deal more than was agreed to be paid for it? From the fact that the Divisional Court allowed the appeal we infer that the County Court judge in estimating the value of the work, etc., actually done, took some other basis of value than the contract prices, and we conclude, therefore, that the result of the decision is that the rule laid down and acted on for estimating the percentage in *Russell v. French* is held to apply to s. 14 (3); but this as we have already intimated is after all a matter of inference, and is not a satisfactory method of reporting.

Yours,

SUBSCRIBER.

[A careful perusal of the report of the case above referred to certainly shews that there is something in our correspondent's criticism. The defect in the report seems to be that it does not set forth the judgment of the county judge nor what was the basis of the calculation he adopted, or in fact what the discussion on that point, if any, was. If that had been made part of the report the reader could more readily understand the reasoning of the appellate judge, and what his judgment as a matter of law really means.—EDITOR, *C. L. J.*]

 REPORTS AND NOTES OF CASES.

 Province of Ontario.

 COURT OF APPEAL.

Maclaren, J.A.]

[Oct. 15.]

GOODISON v. TOWNSHIP OF McNAB.

Leave to appeal to Court of Appeal from order of Divisional Court—Question of “general interest”—Traction engines on highways.

Motion by defendants for leave to appeal to the Court of Appeal from an order of a Divisional Court affirming the judgment of ANGLIN, J., at the trial. The action was for damages to a traction engine which broke through a bridge belonging to the municipality. Judgment was given against the township for \$750. The judgment, it was contended, involved the proper construction of s. 10 of R.S.O. 1897, c. 242, respecting traction engines on highways as amended by 3 Edw. VII. c. 7, s. 43, and 4 Edw. VII. c. 10, s. 60.

Held, the question is one of “general interest” and affects all municipalities in the province. It fairly comes within clause (g) of s. 76 of the Judicature Act, and the application should be granted.

Robinette, K.C., for plaintiff. *Douglas*, K.C., for defendants.

Full Court.]

FITZGERALD v. BARBER.

[Oct. 19.]

Landlord and tenant—Covenant by lessee not to sub-let without leave—Breach—Assignment of interest in lease—Right to renewal—Forfeiture.

Appeal by defendant Loveless from the judgment of MEREDITH, C.J., in favour of plaintiffs in an action for possession of land in City of London and for a declaration that defendants are not entitled to a renewal lease. The lease contained the usual covenant that the lessee would not assign or sub-let without leave “to any other person or persons whomsoever,” with the accompanying provision for re-entry for breach or non-performance of

covenants. The defendants became the assignees of the lease, having obtained leave and were bound by this covenant and provision by virtue of R.S.O. 1897, c. 125, s. 3. That statute also expressly brings the defendant within the provision for re-entry, R.S.O. 1897, c. 170, s. 13. The lessees were co-partners in a trade for the carrying on of which the demised store was acquired by and let to them. After occupying the demised premises for several years they dissolved the partnership, one of the members retiring entirely from the business and going into a like business in competition, selling out absolutely all his share and interest in the concern, including the lease, to the other member without the leave of the lessor.

Held, under these circumstances that there was a breach of the condition. There was in form as well as in substance an assignment of the lease to which each of the lessees was a party, and the case was within the terms of the condition. "The case of *Barrow v. Isaacs* (1901) 1 Q.B. 417 was very different in this respect from this case, for in that case the landlord would willingly have given his consent if it had been asked for, while in this case the parties were at 'daggers drawn,' the lessor watching, if not praying, for an opportunity to re-enter. And it may be here interjected that the enactment before mentioned (R.S.O. 1897, c. 170, s. 13), excepts a covenant against assigning or subletting from its provisions as to relief from forfeiture contained in it. Then it was urged that the transaction was not an assignment, but in law merely a release. This is incorrect, for the lease was that of co-partnership property in regard to which there would be no survivorship and so the case of *Corporation of Bristol v. Westcott*, 12 Ch.D. 461, and what was said in it on this subject is inapplicable here, whatever effect they might otherwise have had, so that, however the case is looked at, what was done came within the very words of the contract of the parties that the lessee should not assign without leave, and it was a violation of one of the very things the parties contemplated in making the proviso.

Varley v. Coppard, L.R. 7 C.P. 505, followed, and see *Horsey v. Stieger* (1898) 2 Q.B. 259, 264, and *Langton v. Henson* (1905) 92 L.T. 805.

Gibbons, K.C., and *G. S. Gibson*, for defendants, appellants. *Shepley*, K.C., and *Meredith*, contra.

HIGH COURT OF JUSTICE.

Boyd, C.] *METALLIC ROOFING COMPANY v. JOSE.* [Sept. 17.
Costs—Appeal to Privy Council—Practice—Execution—Stay—
Set-off of other costs or damages.

When costs of appeal to the Judicial Committee of the Privy Council have been awarded by the judgment of that tribunal, they are not subject to the rules of practice of the lower courts; there is no right of set-off, and no right to modify the direction to pay, which means forthwith after the amount is fixed, unless by application made before final judgment is completed. *Russell v. Russell* (1898) A.C. 307 applied and followed.

The plaintiffs, having been ordered by the Judicial Committee to pay the costs of the defendants' appeal to that tribunal, were held not entitled to a stay of execution for such costs in the court below (the High Court), with a view to a set-off of other costs or of damages to be recovered upon a new trial ordered by the Judicial Committee.

Strachan Johnston, for plaintiffs. *W. T. J. Lee*, for defendants.

Boyd, C.] *LANG v. PROVINCIAL NATURAL GAS CO.* [Sept. 17.
Contract—Construction—Lease of oil rights—Condition—Time
—Well to be “commenced”—Preparations for drilling.

An “oil lease,” or agreement under which the lessee was to have the right to take oil from the land of the lessors, provided that “if within six months from date a well has not been commenced on said promises, this lease shall be null and void.” The well contemplated involved drilling into the ground or through rock several hundred feet. When the six months had expired, it was found that the lessee had done no work on the ground, but had put upon the place where the well was to be drilled some plant suitable for the contemplated operation, at an expense of \$200.

Held, that this did not amount to a commencement of the well; the terms of the lease imported that some work was contemplated upon and in the ground—“breaking the ground” in order to the commencement of a well.

German, K.C., for Lang. *Douglas, K.C.*, for the company. *T. D. Cowper*, for Utz.

Cartwright, Master.]

[Oct. 15.]

HEES CO. v. ONTARIO WIND ENGINE CO.

Discovery—Examination of officer of the company—Motion for leave to examine servant as well—Examination of officer not completed.

Motion by plaintiff for an order for leave to examine for discovery a servant of the defendant company. The president of the company had been examined at considerable length and such examination was not concluded but stood adjourned sine die, presumably to enable him to inform himself on some points of which he was ignorant. Rule 439(a) (2) says that after an examination of an officer or servant of a corporation a party shall not be at liberty to examine any other officer or servant without an order of a court or a judge. It was contended that what had been done here satisfied that condition and that it was necessary that the first examination should be concluded before the rule could be applied.

Held, the meaning of the word "after," as given in the Century dictionary is, "later in time—in succession to—at the close of"—and if the contention is right there may be two or perhaps more examinations all going on at the same time. "With the present inclination of the court to restrict (if not discourage) examinations for discovery, I do not think such result is possible. I have read the lengthy examination of over 50 typewritten pages. The main ground of plaintiff's attack seems to be the alleged weakness of the foundation piers on which the tank was supported. The president could and should obtain all necessary information and all other relevant points, *Clarkson v. Bank of Montreal*, 9 O.L.R. 317, and cases cited. If on further examination the plaintiffs think that they have not got all they are entitled to the motion could be renewed. I make no order at present and reserve the costs unless the parties agree to a dismissal without prejudice as above and with costs in the cause.

Middleton, K.C., for plaintiffs. *Grayson Smith*, for defendants.

COUNTY COURT—PERTH.

Ermatinger, Co. J.]

[Acting for Barron, Co. J.]

DOHERTY v. SCHOOL TRUSTEES, LOGAN.

Public Schools Act, R.S.O. c. 292, s. 62, sub-s. 4—Providing school premises—Neglect by trustees—Liability.

Under the above section it is the duty of school trustees to

purchase or rent school sites or premises and to build, repair, furnish and keep them in order. A boy, aged ten, standing on a platform in front of the schoolhouse in question, was amusing himself during the noon-hour, and when dodging a snow-ball fell off the platform a distance of about 3 feet and broke his leg. The platform was in front of the school house extending its entire width, except on the west side, where it fell short by the width of one plank, which was missing.

Held, 1. The platform was not in such a state of repair and good order as it was the duty of the school board to keep it.

2. The doctrine of contributory negligence is not to be applied to a child of tender years; or, at most, only such reasonable care as ought to be expected from one of his years is required of him, and that boy was not of the age or understanding sufficient to guard himself against the danger, and the doctrine of contributory negligence had no application in this case.

3. The fact that the platform had been unguarded on the side in question for 25 years, and that the missing plank had been gone for 4 or 5 years and that no accident had occurred there before afforded no better defence to the action than did the fact or probability that there are many school platforms in a like condition throughout the country.

The defendants were therefore held liable for the injuries suffered by the plaintiff.

Thompson, K.C., for plaintiff. *Makins*, for defendants.

Province of Manitoba.

COURT OF APPEAL

Richards, J.A.]

[July 23.]

EMPEROR OF RUSSIA *v.* PROSKOURIAKOFF.

*Appeal to Supreme Court—Consolidating two appeals in one—
Supreme Court Act, s. 73, rules 8 and 14.*

In this case an order was made consolidating two appeals to the Supreme Court of Canada from the judgment of the Court of Appeal for Manitoba, pronounced on June 8, 1908, reported ante, p. 506 and in 18 M.R. 56, and giving the plaintiff leave to print one appeal case for the Supreme Court, and directing

that the judgment of the Court of Appeal referred to on the plaintiff's appeals from the orders of MATHERS, J., dated March 28 and April 15, 1908, should be taken as one judgment on one appeal for the purpose of the appeal to the Supreme Court.

Blackwood, for plaintiff. *Levinson*, for defendants.

Full Court.]

REX v. PORTE.

[Oct. 3.

Criminal law—Crim. Code, s. 517—Information, sufficiency of—Charge of doing "an unlawful act."

The prisoner was convicted before a police magistrate at a summary trial of an indictable offence under section 517 of the Criminal Code for that he "did unlawfully in a manner likely to cause danger to valuable property without endangering life or person *do an unlawful act* in the Canadian Pacific Railway yards in the city of Winnipeg," and was sentenced to three months in jail. There was nothing in the information or conviction to shew the nature of the alleged unlawful act, but the evidence shewed that the prisoner had put stones in the journal of a car on the railway track.

Held, that the conviction was bad because it did not shew at all the nature of the unlawful act charged and therefore did not disclose any offence, and that the prisoner was entitled to a writ of habeas corpus and to be discharged; the order to contain a clause protecting the magistrate against any action.

Patterson, D.A.G., for the Crown. *Locke*, for the prisoner.

Macdonald, J.]

ST. VITAL v. MAGER.

[Oct. 12.

Highway—Width of great highways in Manitoba—R.S.C. 1906, c. 19, s. 9.

The plaintiff municipality contended that the public travelled road through the defendant's property should be 99 feet wide instead of 66 feet and brought this action for a declaration to that effect and an injunction to forbid the defendant from continuing to keep 33 feet of the alleged width of the road fenced off for his own benefit.

All the evidence, according to the finding of the trial judge, shewed that the road in question was only 66 feet wide for many years prior to May, 1886; but in that year, pursuant to s. 3 of 49 Vict. (D.), now R.S.C. 1906, c. 99, s. 9, a provincial

order in council was passed requesting the Governor-General in Council to pass an order directing the road in question to be surveyed by a Dominion Land Surveyor. This was done, but the Surveyor-General in authorizing a surveyor to survey the road directed him to make it 99 feet wide. The survey was made as directed and, in 1900, an order in council was passed at Ottawa approving the survey and transferring to and vesting the road in the Province of Manitoba for the purposes of a public highway.

Held, that there was no authority in the Surveyor-General to make the road of a greater width than it had been or to deprive the defendant of any of his land by giving such directions as he had done. The Dominion Government could not by legislation interfere with private rights, nor would it attempt to do so by order in council, and the approval of the survey by the Dominion Government could not deprive the defendant of any of his land.

Action dismissed with costs.

Appleck and Kemp, for plaintiffs. *Dubuc, A.J.H.*, for defendant.

Phippen, J.A.] ROSENBERG v. TYMCHORAK. [Oct. 13.

Costs—Verdict in King's Bench action for amount within County Court jurisdiction—Statutes affecting procedure apply to pending litigation—Increase of jurisdiction after commencement of action—Certificate for costs on King's Bench scale.

This action was commenced in the King's Bench to recover damages for illegal distress. At the trial the plaintiff got a verdict for \$450 damages. After the commencement of the action and before the trial the jurisdiction of the County Courts in such actions was increased from \$250 to \$500. The plaintiff applied under Rule 933 of the King's Bench Act for a certificate to enable him to tax his costs on the King's Bench scale.

Held, following *Todd v. Union Bank*, 6 M.R. 457, that the statute increasing the jurisdiction was one relating to procedure and applied to pending litigation and, therefore, the plaintiff could not tax King's Bench costs without getting a certificate from the judge under Rule 933, but, that, under the circumstances, such certificate should be granted, preventing, also, any set-off of costs by the defendant.

Trueman and Green, for plaintiff. *Manahan and Condé*, for defendant.

Full Court.]

SIMPKIN v. PATON.

[Oct. 14.]

Contract—Claim against estate of deceased person—Corroboration—Executor and administrator.

The plaintiff sued the executors of one Reid for services rendered in taking care of a child of Reid after his death. She had been engaged by Reid as a nurse to attend him in his last illness, and her evidence was that Reid, previous to his death, asked her to continue in the house and to look after his wife and child, and that deceased had said: "If anything happens will you promise that you will stop with her." There was no corroboration of the plaintiff's testimony as to the promises made her by the deceased.

Held, allowing an appeal from the verdict of a County Court in plaintiff's favour, that the evidence of the alleged contract was open to two constructions: (1) that the plaintiff was to stay with Mrs. Reid if anything happened to the testator, (2) that she was to take care of the child; and, the plaintiff having contended that Reid meant she was to stay with the child and take care of it, each may have intended a different thing and consequently no contract was clearly proved, also that corroboration of the plaintiff's evidence was necessary in this case.

Deacon, for plaintiff. *Blackwood*, for defendants.

Full Court.]

[Oct. 26.]

VULCAN IRON WORKS v. WINNIPEG LODGE No. 122.

Practice—Production of documents—Striking out defence for non-production.

Action for \$25,000 damages for intimidation, coercion and conspiracy, arising out of a strike at the Vulcan Iron Works in 1906. By an order of the court the defence of the defendant, Thomas Howe, was made to stand as the defence of all the members of the Iron Moulders' Union of North America Lodge No. 174. It appeared during the suit that a bill of grievances and certain pay rolls used during the strike of 1906 were sent to the parent organization of the iron moulders at Cincinnati, Howe, on his examination for discovery, refused to produce these on the ground that they were not under his control and were outside the jurisdiction of the court.

Held, allowing an appeal from DUBUC, C.J., that the plaintiff had no right to an order striking out the defence of Thomas

Howe in so far as it was on behalf of the members constituting the Iron Moulders' Union of North America, No. 174, because the documents whose production was demanded were outside the jurisdiction of the court, and in the custody and control of the parent organization of the iron moulders at Cincinnati, who were not parties to the action.

Kearsley v. Philips, 10 Q.B.D. 36, and *Fraser v. Burrows*, 2 Q.B.D. 624, followed.

O'Connor and Blackwood, for plaintiffs. *Manhan*, for defendants.

KING'S BENCH.

Mathers, J.]

WILLEY v. WILLEY.

[Oct. 20.

Alimony—Husband and wife—Real Property Limitation Act—Pleading.

The plaintiff's claim was for alimony. The wife left her husband's home in April, 1908. She complained of legal cruelty, but the trial judge found that the defendant had not been guilty of such conduct as would under the principles followed in *Russell v. Russell* (1897) A.C. 395, and *Lovell v. Lovell*, 13 O.L.R. 569, entitle a married woman to leave her husband. The defendant, in 1892, in settlement of an alimony suit commenced in that year, agreed to pay the plaintiff \$3 per week during her life, for her separate use and benefit, such payment not to relieve the defendant from his duty to support her according to his station in life. In 1900, in order to permit him to raise a loan on the land charged by the former agreement, the plaintiff gave him a quit claim deed of it, on the understanding that another agreement of a like effect would at once be executed and registered after the mortgage which was to be given as security for the loan. This was done, the new agreement bearing date the 17th day of October, 1900. Nothing had ever been paid under either of these agreements.

Held, 1. The agreement of 1900 did not operate as a discharge of the money that had accrued due under the former agreement, and that the plaintiff was entitled to be paid \$3 a week, from the 6th day of July, 1892, and interest at 5 per cent. per annum for six years, calculated on all moneys overdue, and to a charge on the land mentioned in the agreements for the amount.

2. Sections 4 and 29 of the Real Property Limitation Act, R.S.M. 1902, c. 100, ss. 4 and 29, do not apply to such a claim, but that s. 24 of the Act would, if it had been pleaded, bar the action, except as to the ten years preceding its commencement; but, as it had not been pleaded, the plaintiff was entitled to recover all the arrears.

Kilgour, for plaintiff. *McKay*, for defendant.

Province of British Columbia.

SUPREME COURT.

Hunter, C.J.] *LITTLE v. HANBURY.* [Oct. 10.
Contract—Negotiation—Incompleteness—Acceptance of offer not proved.

Defendant telegraphed "Propose to go in from Alert Bay over to West Coast of Island hunt elk; guarantee one month's engagement at least from arrival here, take earliest date you could arrive here; Paget recommends; state terms; wire reply." Plaintiff telegraphed in reply: "Five dollars per day and expenses," upon which the defendant telegraphed, "All right, please start on Friday," but received no reply, and on the same day telegraphed the plaintiff: "Sincerely regret obliged to change plans and therefore will not be able to avail myself of your services. Kindly acknowledge receipt of this wire, collect."

Held, that there was no contract. The telegram from plaintiff to defendant was not an acceptance of defendant's offer, but was merely a quotation of terms and could not bind plaintiff except as to terms. The acceptance of the defendant's offer of an engagement must be expressed and could not be implied. *Harvey v. Facey* (1893) A.C. 552, followed.

Fell, for plaintiff. *Langley*, for defendant.

Full Court.] *ESQUIMALT & NANAIMO RY. CO. v. HOGGAN.* [Oct. 31.

Costs—Where suit is defended by the Crown—Vancouver Island Settlers' Rights Act, 1904.

In a statute declaring certain settlers entitled to mineral rights on their lands, there was a provision that any action at-

tacking such rights should be defended by and at the expense of the Crown. On action taken by plaintiff company to test the statute, judgment was given in favour of defendant. The company appealed, and the appeal was dismissed.

Held, as to costs, that defendant was not in a position to claim any costs against the plaintiffs as his rights were being asserted by and defended at the expense of the Crown.

Luxton, K.C., for plaintiffs, appellants. *A. E. McPhillips*, K.C., for defendant, respondent.

Clement, J.] *RAYLANCE v. CANADIAN PACIFIC RY. CO.* [Nov. 2.

Workmen's Compensation Act, 1902—Master and servant—Injury affecting claimant's earning power—Measure of damages.

In estimating compensation under the Workmen's Compensation Act for the loss of a thumb, consideration must be given to the fact that while the claimant is not thereby entirely prevented from carrying on his occupation, his chances of employment in competition with others are lessened and his earning powers consequently reduced.

S. S. Taylor, K.C., for plaintiff. *Macdonald*, K.C., for defendant company.

Full Court.] *EMBREE v. MCKEE.* [Nov. 11.

Contract—Construction of—Surrounding circumstances—Extrinsic evidence.

Plaintiff agreed to sell to defendant, who agreed to purchase, 75 tons of hay, more or less. The hay in question was to be the hay in a certain barn, less some 30 tons which had already been sold. To bind the bargain plaintiff gave a receipt in the form "Received from D. A. McKee \$10 on account of 75 tons of hay, more or less, at \$17.50 per ton delivered on cars." There were some 122 tons in the barn, and evidence was given that the parties negotiated as to "all the hay in Brown's barn," except 30 tons sold.

Held, on appeal, affirming the judgment of Howay, Co.J., that parol evidence could be given to shew what particular hay the parties were dealing for.

Sir C. H. Tupper, K.C., for plaintiff, appellant. *Reid*, K.C., contra.

Book Reviews.

The Drainage Acts of Ontario. By FRANK B. PROCTOR, LL.B., Barrister-at-law. Toronto: Arthur Poole & Co., Law Book Sellers and Publishers. 1908. 373 pp. \$5.

After a short introductory chapter the author gives the Municipal Drainage Act of Ontario, appending to it notes to the various sections which have received judicial construction. He then gives the rules of practice under these Acts. Then follow the statutes of British Columbia and Manitoba on the same subject. The Ditches and Watercourses Act and the Stone and Timber Drainage Act of the Province of Ontario are also published. We have no doubt that this work will be found useful to those of the profession who need information on this subject.

Flotsam and Jetsam.

"The difficulty which I feel as a judge, and always felt at the Bar, is this: a defendant is entitled to put his back against the wall and to fight with every available point of advantage."—Kekewich, J., *Blank v. Footman & Co.* (1888) 57 L.J. (N.S.) C.D. 914.

In a case recently before him in an English County Court Sir William Selfe decided that it was still the law in England that gowns and other wearing apparel given a wife by her husband remained the property of the husband. The proceeding grew out of an attempt to seize the wardrobe of a Chelsea woman for her debts, and it was held that the clothing could not be seized under process or otherwise disposed of without the husband's consent.

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LOCAL OPTION BY-LAWS IN ONTARIO.

At the present time many municipalities are proposing to submit local option by-laws to the electors. If carried, these by-laws may be attacked for faults either antecedent to, or during the vote, or before the final passage by the council. If the by-law is apparently defeated there is machinery provided by which the courts can compel the passing by the council of the by-law, provided there has, in fact, been a majority of three-fifths of the votes in its favour. But if there is a failure to reach that majority local option is dead for three years. It is in the interests of the community that such a measure should be so adopted or rejected as to leave no loophole for attack. Nothing can do more harm than a victory or a defeat gained in such a manner as to lead to a suspicion that the apparent result is not the real will of the electors.

The most important legislation on the subject is that passed in 1906 (6 Edw. VII. c. 24, as amended by 7 Edw. VII. c. 46, s. 11, and by 8 Edw. VII. c. 54, ss. 10 and 11). The effect of the 1906 statute is to give 25 per cent. of the total number of persons appearing upon the last revised voters' list the power to compel the submission of the by-law. If a majority of three-fifths of the electors voting is in favour of local option, the council is bound to pass the by-law, and no by-law preceded by the petition referred to can be repealed for three years and then only by a like three-fifths majority. The petition must be presented before the 1st of November by filing it with the clerk of the municipality (7 Edw. VII. c. 46, s. 11). There is another sort of by-law, one submitted *sua sponte* by the council to the electors, as to which the power to compel its final passage does not exist, and which may be repealed with the approval of a majority of the electors. To this by-law, s. 373 is applicable

and Mr. Justice Anglin in *Re Dewar and East Williams* (1905) 10 O.L.R. 463, has expressed the opinion that this section is not imperative. That case also decides that the council may pass the by-law notwithstanding that they have refused to do so at a previous meeting. But it would seem that the final passing must be within the six weeks after its approval by the electors (s. 373, Municipal Act, 1903).

By-laws may be either for total prohibition, that is, may include both shops and taverns; or for partial prohibition, that is, may be confined either to shops or to taverns: see *Frawley and Orillia* (1907) 14 O.L.R. 99; *Re Hickey and Orillia* (1908) Divisional Court. In the opinion of one learned judge if a by-law is passed affecting shops only, no total prohibition by-law can then be passed: see *Re Hickey and Orillia*, ante, but the effect of both the Orillia cases gives an apparent majority against that view.

The day for voting on local option by-laws is now municipal election day, though the polling subdivisions need not be identical, and indeed must not be, if a larger number of voters than can be conveniently accommodated is included in the municipal polling subdivision: *Wynn v. Weston* (1907) 15 O.L.R. 1, and *Re Hickey and Orillia*, ante.

If a by-law is passed by the requisite majority then notwithstanding its quashing by the court either for technical or substantial reasons, no liquor licenses can be issued without the written consent of the Provincial Secretary, and where such consent is withheld, leave to appeal against the quashing has in one case been refused apart from the merits: see *Re Hickey and Orillia* (1908), Osler, J., in Chambers, not reported.

The provisions of the Municipal Act regarding the preliminaries to the submission to the electors are found in ss. 338 et seq. of the Act: see *Sinclair v. Owen Sound* (1907) 39 S.C.R. 239.

Those preliminaries are the first and second reading of the by-law by the council, which by-law shall (1) fix the day and hour and places for taking the vote, which may now be done

by stating that they shall be the same as for the municipal elections (4 Edw. VII. c. 22, s. 8) but still having regard to the opinions expressed in *Hickey and Orillia*, ante, (2) name a deputy returning officer for each poll; (3) fix a place and time for the clerk to sum up the votes; (4) fix a time and place for the appointment of persons to attend at the various polling places and at the final summing up by the clerk on behalf of promoters and opponents of the by-law. The omission from the by-law of the time and place for summing up the votes renders the by-law invalid: *Re Bell and Elma* (1906) 13 O.L.R. 80, and see and compare *Coxwell and Henshall* (1908) not reported.

The by-law must be first advertised not less than three nor more than five weeks before election day: *In re Henderson and Mono* (1907) not reported, and *In re Armstrong and Toronto* (1889) 17 O.R. 766, a first publication more than five weeks before election day, when continued and adopted invalidated the by-law. In *Re Vandyke and Grimsby* (1906) 12 O.L.R. 211, a similar first publication which was abandoned was held to have no such effect. These weeks are ordinary weeks, not periods of seven days excluding Sundays and holidays: *Re Armour and Onondaga* (1907) 14 O.L.R. 606, and *Re Duncan v. Midland* (1907) 16 O.L.R. 132.

Publication must be made for three successive weeks by inserting a true copy in some public newspaper published either (1) in the municipality; (2) or in the county town; (3) or in an adjoining or neighbouring local municipality. And where it is to be published must be determined by resolution of council. A copy of the by-law must also be posted up at four or more of the most public places in the municipality. This should be done, of course, before the voting.

Care must be taken that the copy is a true copy and the clerk must append to the copy so published and posted up a certificate (1) that it is a true copy, (2) that the by-law is the one that has been taken into consideration by the council, (3) and that the same will be passed, if assented to by the electors, after one month from the first publication, (4) and giving the

date of first publication, (5) and stating the day, hour and place where the vote will be taken. Care must also be taken to see that the first publication gives room for the month to expire and yet not to be more than five weeks before the vote.

After the day for voting has been fixed the clerk must have the ballots printed in the form given in 8 Edw. VII. c. 54, s. 10. The head of the municipality must also, at the time and place named in the by-law, appoint in writing two persons to attend at the final summing up by the clerk and one person to attend on behalf of each side at each polling place. Such person must, before appointment, sign a declaration before the head of the municipality in the form given in sched. "K." to the Municipal Act that he is interested in promoting or opposing the by-law.

The taking of the vote is conducted in the usual way. The voters are those entitled to vote at municipal elections: *Re Croft and Peterboro* (1890) 17 A.R. 1, and each elector has one vote: sec. 158, and *Re Sinclair v. Owen Sound*, supra.

"Electors" are defined in the Municipal Act (3 Edw. VII. c. 19, s. 22, s.-s. 5) as the persons entitled for the time being to vote at any municipal election or in respect to any by-law, resolution or question. Those answering that description are detailed in ss. 86, 88, 89, 92, 93, while s. 355 is applicable where the ward system prevails but is not effective to give a double vote. It relates solely to voting on money by-laws: see *Sinclair v. Owen Sound* (1906) 12 O.L.R. 488, (1906) 13 O.L.R. 447, (1907) 39 S.C.R. 236.

The voters' list is the one referred to in s. 148 and following sections. The provisions of s. 348 are meaningless as they appear at present, having regard to the amendment 8 Edw. VII. c. 48, s. 4, unless they provide a list of those income voters whose names appear on the last revised assessment roll—which and possibly those who, having disfranchised themselves, may be different from that on which the voters' list is based—become entitled to vote under section 88. See views quoted and expressed in *Re McGrath and Durham* (1908) not reported.

Deputy returning officers and poll clerks may vote if they

provide themselves with a certificate under s. 347, and agents if given a certificate under s. 163.

The right of deputy returning officers to vote has been held in the negative by Riddell, J., in *Re Armour and Onondaga*, ante, and in the affirmative in *Re Saltfleet* (1908) 16 O.L.R. 293, and in *Re Joyce and Pittsburg* (1908) 16 O.L.R. 380. Ballot boxes may be used for concurrent voting for other objects: *Re Duncan v. Midland* (1907) 16 O.L.R. 132.

Voting takes place as at municipal elections (see s. 351). The provisions of the Act applied by that section include those from s. 138 to s. 206, except s. 179, "so far as the same are applicable and except so far as is herein otherwise provided." Among other things these provide for the delivery to every deputy returning officer of directions for voting which are to be posted up inside and outside of the polling place (s. 147) of certificates of the dates of the last day for making complaints to the county judge with respect to the voters' list and of the day on which the assessment roll was finally revised and corrected (s. 156).

The mode of voting is set out in s. 168, and while a voter is in the compartment provided in each polling place (see s. 145) no other person shall be allowed therein or to be in any position from which he can observe how the ballot paper is marked (s. 169). This has been held important in *Hickey v. Orillia*, ante.

The voter must leave his ballot with the deputy returning officer, but putting it in the ballot box himself is not a forfeiture of the right to vote: see *Duncan v. Midland* (1907) 16 O.L.R. 132.

The summing up of the votes takes place at the close of the poll and the statement to be made by each deputy returning officer is set out in s. 359 and the latter's duties are detailed in s. 360, 361, 362 and 363. Then the clerk of the municipality at the time and place mentioned in the by-law, in the presence of those appointed to be present, sums up the numbers of votes and forthwith thereafter certifies to the council the result (s.

364) but he has no vote. The by-law must receive a majority of three-fifths of those voting, otherwise it is defeated.

After the clerk has certified the result to the council a period of two weeks should be allowed for the scrutiny under s. 369, before the by-law is read a third time even although no one asks for such a scrutiny. This is to avoid trouble in view of the decision of the Court of Appeal in *Re Duncan and Midland*, ante. But the point is still doubtful as the Divisional Court reversed Mulock, C.J., on this point and the Court of Appeal was equally divided, Moss, C.J., only agreeing in the result which was to dismiss the appeal from the Divisional Court. Mulock, C.J., in *Re Coxwell and Henshall* (1908) not reported, has since refused to give effect to that objection.

Section 204 is applicable to the carrying of these local option by-laws. It provides in effect that the vote which gives the assent of the electors shall not be declared invalid by reason of a non-compliance with the provisions of the Municipal Act (1) as to the taking of the poll, (2) the counting of the votes, (3) as to any mistake in the use of the forms, (4) or by reason of any irregularity, if it appears to the court that the voting was conducted in accordance with the principles laid down in the Act and if such non-compliance, mistake or irregularity did not affect the result of the voting.

This provision is most important. The courts have generally striven to apply it where fair attention has been given to the conduct of the voting and no one has been prevented from voting. The following have been held to be within the saving provisions of this section.

1. No newspaper designated in the by-law: *Dillon v. Cardinal* (1905) 10 O.L.R. 371; and no places specifically designated for the voting: *Re Coxwell and Henshall*, ante.

2. Persons allowed in the polling place who were not entitled to be there: *idem* and *Re Sinclair v. Owen Sound* (1906) 12 O.L.R. 488; *Re Rickey v. Marlborough* (1907) 14 O.L.R. 587, but see *Re Hickey v. Orillia*, ante, a case strikingly similar on the facts to the *Cardinal Case*. But the Divisional Court held in the *Orillia Case* this offended against the principle of secrecy.

3. Non-performance by the deputy returning officer of various duties required of him at and after the close of the poll (*idem* and *Re Rickey and Marlborough*, ante, and other cases noted below).

4. Irregular voters' lists: *Re Sinclair v. Owen Sound* (1906) 12 O.L.R. 488; *Re Duncan and Midland* (1907) 16 O.L.R. 132.

5. Omission to enter the electors as voting: *idem*, and *Sinclair v. Owen Sound*, ante.

6. Declarations missing or not taken: *idem*.

7. Defaulters' list not supplied: *idem*.

8. Certificates not furnished to deputy returning officer: *idem*.

9. Oath of secrecy not taken: *idem*, and *Wynn v. Weston* (1907) 15 O.L.R. 1.

10. Number who voted not certified by deputy returning officer: *idem*.

11. Publication of by-law defective: *idem*, and *Re Robinson and Beamsville* (1906); (1907) not reported.

The following have been held not to be within the curative provisions of s. 204:—

1. Omission to post directions to voters: *Re Salter and Beckwith* (1902) 4 O.L.R. 51.

2. Want of posting up of copies of by-law: *idem*.

3. Illegal voting if it affects the result: *Re Cleary and Nepean* (1907) 14 O.L.R. 392.

4. Want of proper publication: *Re Cartwright and Napanee* (1905) 11 O.L.R. 69; *Re Rickey and Marlborough* (1907) 14 O.L.R. 587.

There are a few further points to be noted: In *Re Dillon and Cardinal* (1905) 10 O.L.R. 371, Mr. Justice Magee and the Divisional Court were of opinion that in voting on by-laws there is no obligation to secrecy upon the subject of requesting or depositing a ballot and that the presence of other electors in the polling place who are voting is unobjectionable. This is not the view of the Divisional Court in *Re Hickey and Orillia*, ante, but as the latter case was not fully argued on this point, the

whole question of the amount of secrecy required and the effect of its partial absence needs thorough consideration.

In *Re Armour and Onondaga* (1907) 14 O.L.R. 606, Riddell, J., says the proper method of deducting votes improperly cast was that of deducting those votes from the total and then taking three-fifths of the remainder.

The question of how far the court will go into the right of the individual voters to vote has been much debated. In *Re Coe and Pickering* (1865) 24 U.C.R. 439, the court seem to have thought a single judge might do it, but not the court in banc. In *Re Leahy and Lakefield* (1906) not reported, and in *Re Young and Binbrook* (1899) 31 O.R. 108, the court went behind the voters' list and held the voting to be illegal because of improper votes or of improper omissions from the list.

In *Re Salter and Beckwith* (1902) 4 O.L.R. 51, Britton, J., decided that the voters objected to were qualified. In *Re Dillon and Cardinal*, ante, Magee, J., thought illegal votes were a ground for quashing; and Mabee, J., in *Re Sinclair v. Owen Sound* (1906) 12 O.L.R. 488, had no doubt that it was an element for the consideration of the court on a motion to quash. The Divisional Court discussed the question and decided that even if proved and the votes deducted, it did not affect the result. Mabee, J., in *Re Cleary and Nepean* (1907) 14 O.L.R. 392, decided that the foregoing cases bound him to consider the illegality of votes. Riddell, J., in *Re Armour and Onondaga* (1907) 14 O.L.R. 606, went into the question of qualification at length and deducted those improperly voting, but he limited his enquiry to those bad or good by reason of circumstances arising after the final revision of the roll, holding himself bound by *Reg. ex rel. McKenzie and Martin* (1897) 28 O.R. 523. In *Re Saltfleet* (1906) 16 O.L.R. 293, the Divisional Court laid down the rule that the voters' list is final and that all that can be considered by a judge upon these applications are the cases excepted by the Voters' List Act itself, that is, those guilty of corrupt practices, those who have become non-resident after the list was revised, and persons not qualified or competent to vote

under the Voters' List Act, 7 Edw. VII. c. 4, s. 24, and (unless the change in the statute renders *Wynn v. Weston* (1907) 15 O.L.R. 1, inapplicable) also those added by the county judge under 8 Edw. VII. c. 4, s. 24. *Re Saltfeet* was followed in *Re Mitchell and Campbellford* (1908) 16 O.L.R. 578, and by a Divisional Court in *Re McGrath and Town of Durham*, decided November 20, 1908, not reported.

The voters' list cannot be added to, and, semble, s. 348, in its present form applies only to money by-laws: *Re Sinclair and Owen Sound* (1906) 13 O.L.R. 447; *Re McGrath and Durham* (1908) not reported.

The effect of the above decisions would seem to confine "electors" to those on the voters' list. It is possible that this may be too narrow a view and it may do injustice if the voters' list is based upon a prior assessment roll and not upon that which is actually the last one revised, the electors on which have the right to compel the submission of the by-law.

FRANK E. HODGINS.

LAW REFORM.

PART III—COSTS.

The above sub-title comes very close to the subject of law reform, though as intimated before, no attempt will be made to present it as one within the range of any immediate legislative action; but rather as a matter for consideration by members of the profession in order to see whether in the interests of both public and profession some general principles cannot be formulated which will bring the remuneration paid to solicitors somewhat more nearly to present-day requirements so that no more and no less than the value of the solicitor's services may be paid for every piece of work that he does. If the subject of settlements is one barren of authority, the question of costs is a department teeming with precedents; but so far as they deal with tariffs such precedents are perhaps somewhat foreign to

this article. The first principle to bear in mind is that costs are payment for lawyer's services; the means by which he makes his living and that if the practice of law is to be decently and honourably conducted, it must offer to good men a fair and liberal return. For solicitors in England their fees were never looked upon as honoraria, they were always the lawyer's "wages" for work done and something to which he was entitled by right (see *Germyn v. Rolls*, Cro. Eliz. 425 to 459; *Thursby v. Warren*, Cro. Car. 159), and in our country where the two professions are combined the right to recover fees is expressly given by statute. No sensitiveness, therefore, on the subject such as was manifested by Erle, C.J., in *Kennedy v. Brown*, 13 C.B.N.S. 677, should preclude us from considering the payment of fees in their true light, namely, as the lawyer's means of livelihood, and, when this is applied to modern conditions and cost of living, we shall at least have a sensible view point from which to observe this important topic.

It should next be pointed out that no system of fees can be satisfactory that does not consider the various elements of cost that enter into the conduct of this as of any other business or manufactory. A lawyer would make much fairer charges which he could more fully justify if to each piece of work done he could allot approximately the initial cost incurred in carrying it out. The elements of rent, taxes, wages, office expenses and interest on capital are just as real and just as insistently present in his business as in any mercantile pursuit, and no lawyer can say that his work has cost him nothing, because he has paid no cash for government fees, stamps or other out of pocket disbursements. If it were realized that everything done has cost money and if the amount of cost could be allotted in each case (and there is nothing to prevent it) a lawyer would know just how much he is giving a client when he undercharges or does work for nothing, and how much, therefore (and this is most important) he is overcharging some one else in order to bring his receipts up to a point that will enable him to live. It is not pretended that work must not sometimes be done for nothing

or for less than its value. It is the privilege of every professional man to help those who would otherwise be without legal assistance; but he ought to know what his charities are costing him and ought to see to it that his generosity is not visited upon some other client whose means may enable him to pay for the work done not for him only but also for someone else. Similarly just as the man who sells goods below cost is an object of suspicion and a menace to his confrères in the business, so a man who habitually undercharges is a danger to the profession for as he must live, his livelihood is necessarily derived from some other and possibly some questionable source or else he is bringing the standard of living down to a point which will necessarily drive better men into some more remunerative employment where they can live and do business according to higher notions of propriety than the rewards in law will permit. One of the first reforms suggested, therefore, is some system of charges that will enable lawyers to ascertain and to charge according to the original cost of the work done. It is scarcely necessary to point out that our tariff absolutely ignores this. The only disbursements provided for are such as are paid out of pocket, and many things that are nothing but disbursements, such as the copying of documents, can only be charged for according to arbitrary fees. Now the copying of documents is a disbursement pure and simple, involving generally the purchase of a typewriter, the use of so much paper, the payment of so much wages and the interest upon capital invested in office fixtures and required in the work; and the first essential would be to find out what, under modern conditions, is the cost of such work and what is a fair profit to the solicitor for his share in the production of the document. Much of the work done in an office has similarly its own initial cost, but probably such a thing is never considered in making charges and it is certainly never contemplated in our tariff.

The tariff itself is not only extremely antiquated but is very partial. It makes no provision for work done in the criminal courts, for the vast amount of work done in connection with

dealings in land or with companies and it has many charges such as fees on orders, term fees, and other charges made in litigation which have no real connection with the work done in an office. Then the necessity for rendering itemized bills for work done with their paltry charges for letters, attendances and postage have been the subject of constant ridicule and criticism, and it is safe to say that almost every bill rendered as required by the tariff is unintelligible and annoying to the average layman. No criticism of the habit of making charges is offered. Some record of work done is necessary and such records should unquestionably be carefully kept; but it is submitted that in most case the results merely of that record need in the first instance be furnished the client and those only in a condensed form.

In practice lawyers' bills are not usually excessive, nor are they generally or even frequently disputed and solicitors will probably find that criticism is disarmed rather than invited by rendering bills containing only a short summary of the work done, a reference to the disbursements, if they are not merely negligible, and a lump sum for fees. It is probably the experience of many that such bills sent with some regularity, on half a sheet of paper are less frequently criticized than the bulky document containing every item, which from the labour involved in its preparation, leads frequently to such a delay in rendering it as to itself create difficulty when at last sent out. Itemized bills will, perhaps, always be necessary for purposes of taxation or suit (though it is submitted that even for these objects they might be much simplified), but few bills are either sued or taxed, and for practical purposes a short summary is a great inducement to solicitors to render bills promptly. Clients too are better pleased, and if it could be made a practice to render bills either immediately the work is done, or at the end of the month in which it is completed, an immense amount of trouble would be saved and much money gained, for a bill promptly rendered is a bill more likely to be promptly paid, while lawyers will find as merchants do, that bills long delayed in their offices before rendering will be paid also in a casual manner and that

other claims upon the debtor's purse will receive first consideration.

The "account rendered" habit is also a good one. It consists in keeping a list of all accounts rendered in a book devoted to that purpose. It shews the date of sending the account, the name of the debtor and the amount, and has spaces to shew the dates of payment and amounts paid. It is gone over at regular intervals, say at the end of each month, and short reminders may be sent out shewing the date rendered, and the amount, etc., as follows:—

John Smith, Esq.,

In account with

1908

Solicitors, etc.

June 30th.

To account rendered

\$30.00

Dated Nov. 30th, 1908.

This is frankly mercantile, but sensible, and in no way unprofessional, nor does it offend anyone in ninety-nine cases out of one hundred; while it assists wonderfully in putting a lawyer's finances upon a sounder basis and removing one incentive to overcharging or improper dealing with funds by insuring a somewhat more prompt return for work done. Such simple practices are not by any means beneath the consideration of the profession, for where a man is fair to himself and his partners in the matter of bills and payments, he will have that much less temptation to be unfair or unscrupulous in dealing with his clients. One addition to our tariff might well be some recognized standard of fees for honest, though unsuccessful efforts, to settle or shorten litigation. No one denies the importance of such work, but our tariffs only permit the recovery of costs between party and party where such attempts to settle have borne fruit. Any extension of the rule, unless carefully safeguarded, might be made the subject of great abuses, but where one party succeeds in drawing up on paper a feasible scheme which will reduce costs and submits it to the other side, the expenses thereby incurred might well be made part of the taxable costs between party and party, unless the other side has

some good reason to shew for declining it. Such costs might properly be added to the bill of the successful party where the proposal comes from him or deducted from his bill where it emanates from the opposite side and has been rejected.

One matter which has been already agitated a good deal in the profession is the question of drawing up some scale of fees for the work done in the organization of companies and the ordinary transactions in real estate such as the purchase and mortgage of lands. There is no tariff expressly covering these matters and in the case of companies there is no general experience such as will accurately guide a solicitor engaged in such matters. Various firms make different charges; in all cases probably based, to some extent, upon the amount involved in the transaction and the responsibility incurred, as well as upon the work actually done, and it is a remarkable thing that such bills scarcely, if ever, appear before a taxing officer on solicitor and client taxations. These matters have been considered by a Committee of the County of York Law Association, but no report has yet been made.

Real estate agents have a recognized commission pretty well adhered to by them. This commission is generally two and one-half per cent. on the amount involved, and is based largely upon the fact that no charge is made unless a deal is consummated. A lawyer's work is usually just as great and the responsibility much greater, but he expects to receive his fee whether the deal is closed or not, and there is theoretically no element of uncertainty in it, the fees, therefore, should not be as high. In the writer's judgment one or two difficulties which will be encountered in fixing fees at a percentage of the amount involved in the case of real estate transactions is the fact that people may be tempted in the larger transactions to suggest a fee which, while based somewhat upon the responsibility, will be disproportionate to the amount of work required. It would probably be found, however, to be of great assistance to the rank and file of the profession if a general scale of charges for work of this kind could be arrived at, based in all cases upon a

percentage; and while there might be some objection from the larger and more important firms to depart from practices which they have found to be satisfactory, both to themselves and their own clients, any self-sacrifice on their part by agreeing to a general tariff would probably be of much assistance to the ordinary practitioner. In theory there seems to be no reason why in the case of real estate, percentages should not be arrived at, which, while they differ somewhat in different localities, would fairly repay solicitors for the work which they do and which would have the inestimable value from the client's point of view of enabling him to tell accurately what it would cost him to buy or sell land. It is easier to act generally for a vendor than a purchaser, and the responsibility is much less. In the Land Titles Office, a solicitor for the purchaser finds his work and responsibility greatly reduced, and in transactions where the purchase money is small, the work may be almost as great as in much larger transactions, though the responsibility is not so considerable. Therefore, a sliding scale where the percentage is somewhat larger for small transactions than for important ones would probably be fair. These considerations would most likely be found to form a sufficient basis for the discussion of such a percentage.

The necessity for some simple, certain and general system of charges upon real estate transactions has, in this province, become acute. Nearly all companies who lend money on mortgages have their tariff for such work to which solicitors acting for them are expected to conform. Unless one's office is organized to do that class of work by wholesale, these tariffs will be found to be unremunerative, and there is a movement to introduce into this province from the United States, title guarantee companies, who will absorb much of this business, unless it can be found that work can be done by a lawyer with the same accuracy and according to a stated scale of charges which will enable the client to tell, beforehand, what his dealings will cost him. In a country like ours, where the Land Titles System is already in vogue, where titles are comparatively simple and land registers

fairly accurate and complete, there will be but little inducement for the exploitation of title guarantee companies, provided only the scale of fees on transfers are moderate, certain and simple.

For the incorporation and organization of companies, fees will be found to vary wonderfully. One instance is known to the writer where a company of \$40,000 was incorporated and organized for a fee of \$25. This is probably almost unique. Others have said that for similar work their charges have been as much as \$300 or \$400. This amount seems to be extreme. It is possible that the tendency in discussing these matters amongst the profession is to state a sum in excess of what is actually charged; but there is a great field for usefulness for a representative committee to meet and draw up a tariff which would lay down proper fees for such services, and which would put an end to the wide divergence which at present exists. There is no doubt a good deal of canvassing done amongst persons about to incorporate a company to find out who will do the work most cheaply, and there are chartered accountants who do such business, having all the forms which they consider necessary for that purpose and whose fees are usually considerably less than those which any professional man would be willing to charge. The only consolation the profession can derive from the fact that such work is done now by accountants is the feeling akin to that which possesses us when we find that a man has been his own lawyer and has drawn his own will.

The subject of fees in the Surrogate Court has also been discussed in the profession. It will be found that the fees do not contemplate, for instance, the work which is now done in preparing succession duty papers, and all fees are upon a scale which is not in any way proportionate to the value of services rendered to an estate of any size. This tariff also requires careful consideration and it would probably be found that if a representative committee of lawyers, either convened by the Benchers or otherwise, were to meet and prepare a tariff not only upon the matters last mentioned, but upon all questions of costs they could simplify greatly the present unsatisfactory and illogical method of keeping and rendering bills.

This article does not argue for any general increases in the charges which are made. It is only a plea for the simplification of the tariff and the introduction into offices of methods which, because they are simple, straightforward and exact, will more likely ensure a fair distribution amongst all clients of the expense of the work done for each and at the same time, a fair and liberal return to the professional man, which will enable him better to live up to and support the dignity and importance of his calling. If any general reforms such as are outlined could be introduced and a tariff drawn up which would appeal to and be adopted by the profession generally, much of the present temptation to undercharge, or to win clients from other solicitors by reducing fees to below a proper standard of living for a professional man, would be obviated.

SHIRLEY DENISON.

**PROOF OF DANGEROUS TENDENCY BY EVIDENCE OF
PRIOR EFFECT.**

The dissenting opinion in a recent New York case illustrates a reactionary tendency which has already assumed considerable proportions. The majority held that evidence of a prior accident in a passageway through an elevator shaft was admissible, to indicate the dangerous character of the place. Two justices maintained that, since it was not shewn that the defendant knew of the former accident, the testimony was incompetent. *Cefola v. Siegel-Cooper Co.* (1908) 111 N.Y. Supp. 1112.

Where such knowledge of dangerous tendency or quality is possessed by the individual charged with responsibility, evidence of the accidents whether one or many, through which this knowledge was derived, is uniformly admitted. Clearly, it gives rise to an inevitable inference of negligence. *City of Chicago v. Powers* (1866) 42 Ill. 169. But even where such notice and knowledge are lacking, proof of prior effect, it is submitted, is relevant. In order to investigate properly the merits of a given accident, it is not merely desirable, but material to

determine the tendency, nature, and quality of the place or object involved. To determine these accurately, it is essential to apply the practical test of common experience. *Phelps v. R. R. Co.* (1887) 37 Minn. 487. Failure to realize the true evidentiary purpose and that negligence or due caution are, at best, merely indirect inferences, has led to much of the confusion of the cases, which a neglect of two simple conditions of admissibility has not lessened.

In the first place, to make the evidence of prior effect *legally* relevant in an action where its present effect is at issue, an underlying similarity of conditions must be shewn. *Aurora v. Brown* (1882) 12 Ill. App. 131; *Bailey v. Trumbull* (1863) 31 Conn. 581. In the absence of such proof, the evidence is of too indirect a character to be of practical probative value. *Sullivan v. D. & H. Canal Co.* (1900) 72 Vt. 353. Secondly, the more recent evidence of injury at the given place, the more strongly does the presumption of a continued similar condition operate. Where the accident occurred at too distant a date, evidence of it has often been excluded, on the theory, seemingly, that while ordinarily it is merely the *weight* of the evidence which varies inversely as the remoteness increases, still, at a certain point the evidence itself becomes too unimportant to be legally material, a fortiori, competent. The conditions of modern trial by jury afford an explanation. Oftentimes these two grounds of exclusion are confused, but that there are two distinct inferences involved, is clear. Cf. *Gillrie v. Lockwood* (1890) 122 N.Y. 403. At what precise stage the exclusionary principles should operate is a question for the trial court to determine. (Thayer, *Prel. Tr. Evid.*, 517: "In such cases it is a question of where lies the balance of practical advantage.") Necessarily, the question must be largely one of judicial discretion; but that, it is submitted, in no way justifies an inflexible rule of exclusion. *Bemis v. Temple* (1894) 162 Mass. 342, 4.

In the first American case in point, *Collins v. Dorchester* (Mass. 1850) 6 Cush. 396, an injury occurred on a highway through an alleged defect in a railing. The Massachusetts

Supreme Court, speaking through Metcalfe, J., denied that evidence that another person under like circumstances had recently suffered a similar accident was admissible. Coming from so distinguished a source, this ruling naturally influenced subsequent development, and, together with the case of *Temperance Hall Assn. v. Giles* (1869) 33 N.J.L. 260, explains a long line of similar decisions. *Aldrich v. Pelham* (Mass. 1854) 1 Gray 510; *Parker v. Publishing Co.* (1879) 69 Me. 173, and cases cited. Either that the introduction of collateral events results in confusion of issues, or that the probative value is disproportionate to the incident expense of time, is the usual ratio decidendi. *Phillips v. Willow* (1887) 70 Wis. 6. If the two fundamental exclusionary principles, which have been indicated, are heeded, such consequences will rarely, if ever, be involved. It is far preferable to submit the proffered evidence to these preliminary tests than to adopt an invariable rule of exclusion which is not only illogical, but unnecessary. The theory of *Collins v. Dorchester*, supra, reached its high water mark in *Martinez v. Planel* (1869) 36 Cal. 578. The attack on its underlying fallacies, beginning with *Darling v. Westmoreland* (1872) 52 N.H. 401, culminated in the New York leading case of *Quinlan v. Utica* (1877) 11 Hun. 217, affirmed 74 N.Y. 603. These cases squarely hold that in any investigation, legal or scientific, a knowledge of the nature of the place or object involved is essential and that to properly ascertain this, the test of experience must necessarily be employed. This has since been repeatedly recognized as a specific ground for admitting evidence of previous accidents, *Fordham v. Gouverneur* (1899) 160 N.Y. 541; *Taylorville v. Stafford* (1902) 196 Ill. 288, though in many rulings the identical evidence, in the light of surrounding circumstances, has been likewise held competent to indicate notice to the person charged with responsibility. *Stair v. Kane* (1907) 156 Fed. 100. Thus, prior accidents on a defective pavement may be admissible, not only to shew that the common cause of the respective injuries possesses certain dangerous characteristics, but also to charge the municipal authorities with notice thereof, *District of Columbia v.*

Armes (1882) 107 U.S. 519; accord, *Phelps v. R.R. Co.*, supra. The two, however, are quite distinct.

The undeniable reactionary tendency in New York, revealed in the minority reasoning, is prevalent, also, at present, in a few other jurisdictions, and it is the more remarkable, perhaps, because of a recent liberal treatment of this evidence in Massachusetts itself. *Flaherty v. Powers* (1896) 167 Mass. 61; *Spaulding v. Lithograph, etc., Co.* (1898) 171 Mass. 271. Such a reaction seems unfortunate. It might, however, be noticed that a total absence of proof of recency or of similarity of conditions seems to discredit the actual result reached by the majority.—*Columbia Law Review*.

The preservation of the sacredness of the persons and personal liberty of the King's subjects has always been one of the boasts of the British Constitution; and this is something which should not be lightly encroached upon. It is not in these times of peace, plenty and prosperity that the need for such a safeguard is much in evidence as it is in the troublous times that have been, or in the troublous times that may be hereafter. Whilst this is so there is much in what was graphically said by Mr. Justice Riddell in a judgment recently delivered by him in the case of *Rex v. Leach*, on an application for a habeas corpus. He said: "It is to be hoped that the courts may long be spared the disreputable spectacle of a litigant claiming an advantage from an alleged irregularity in which he himself participated. A defendant has, undoubtedly, the right to place his back against the wall and fight with every advantage; he has, I think, no right, if he come out from the wall, to complain that his adversary gets behind him. And the rules in favour of the accused, derived from the bloody days when the mother was hanged for a petty theft to stay the hunger of her famishing brood, are not to be extended or applied where not reasonably applicable." But the pendulum may swing too far the other way. The liberty of the subject is a valuable relic.

Our English exchanges refer with deep regret to the death of Lord Justice Mathew. Sir James Mathew had a reputation of being a great lawyer as well as having special knowledge and grasp of all matters connected with commercial law. It will be remembered that he was the originator of the Commercial Court over which he presided for some years. He was, subsequently, appointed to the Court of Appeal, from which he retired about two years ago, owing to ill-health. The learned judge was born in 1830, and was educated at Trinity College, Dublin. In 1881 he was raised to the Bench. As a criminal judge he was said to be thoroughly human, and in striking contrast with his brother Catholic judge, Sir John Day, making allowances and being lenient in his sentences. Though he had a reputation of being a wit and the best after-dinner speaker on his circuit, he did not carry his pleasantries to the Bench. Among other good things, one of the best of his sayings was that although in the eyes of the civil law husband and wife were one person, yet if a man killed his wife it was murder, not suicide. Mr. Mathew was one of the juniors for the prosecution in the *Tichborne Case*.

We notice that *The Times* enlarges upon the suggestion of a New York paper that a retiring President of the United States should, as a matter of course, have a seat in the Senate, receiving an appropriate salary. The thought is based upon the very sensible argument that the President, whether he be one of the greatest or only one of the average type must inevitably acquire a great fund of experience and knowledge in national business. He becomes, it is said, a national asset, and it is reasonable that the knowledge and experience that he has acquired should remain at the disposal and in the service of the nation. Possibly the principle involved in this suggestion might occasionally be beneficially invoked as to the selection of men for the Senate of the Dominion. But the supposed exigencies of party politics would probably stand in the way.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

PRACTICE—COSTS—SOLICITOR—TAXATION OF COSTS AFTER PAYMENT—THIRD PARTY LIABLE TO PAY—"SPECIAL CIRCUMSTANCES."

Hirst v. Fox (1908) A.C. 416 is a case known in the court below as *Re Hirst* (1908) 1 K.B. 982 (noted ante, p. 451) and it is somewhat surprising that it should have been thought of sufficient importance to be carried to the House of Lords, and it is not surprising to find that their Lordships regarded the appeal, which took the greater part of two days, as a waste of their valuable time. The whole question was as to whether or not a solicitor's bill was liable to taxation. The costs were costs of an action which had been compromised, the defendants agreeing to pay the plaintiff's costs as between solicitor and client. The plaintiff paid her solicitors' bill without taxation, and the defendants subsequently applied as third parties liable to pay for an order to tax it. This was granted by the Court of Appeal (see ante, p. 451) and it is from that decision that the present appeal was brought by the solicitors. Their Lordships (Lord Loreburn, L.C., and Lords Ashbourne and Macnaghten) affirmed the order for taxation, but in doing so they dealt the appellants a backhanded stroke by varying that part of the order appealed from which had directed the client to pay the costs of the prior appeal, by ordering the solicitors themselves to pay them.

TRADE MARK—INFRINGEMENT—ASSIGNMENT OF TRADE MARK—CAUSE OF ACTION.

Ullmann v. Leuba (1908) A.C. 443. This was an appeal from the Supreme Court of Hong Kong. The action was brought to recover damages for infringement of a trade mark. The facts of the case as found by the Judicial Committee of the Privy Council (Lords Robertson, Atkinson and Collins, and Sir A. Wilson) were, that the plaintiffs were manufacturers of watches in Switzerland. They sold watches for the purposes of trade to a firm in Hong Kong, carried on by one Madame Bovet, who, for the purpose of trade had them marked with the trade mark in question. This trade mark had been assigned to the plaintiffs. The court below had granted the plaintiffs relief, being of

opinion that the business of Madame Bovet, in Hong Kong, had also been transferred to the plaintiffs, or that, at all events, owing to the course of the proceedings of the trial, the defendants were not in a position to say that it had not. The Judicial Committee, however, considered that it was clear upon the evidence that there had been no transfer of the business of Madame Bovet to the plaintiffs, and, consequently, they had no status to maintain the action, a mere assignment of the trade mark giving them no such right. As regards the plaintiffs, the only person who could be deceived by the defendants' use of the trade mark in question, would be Madame Bovet, and it was clear that she was not, in fact, deceived. The appeal was therefore allowed, and the action dismissed.

LEAVE TO APPEAL—JUDGMENT FINAL AND CONCLUSIVE UNDER
COLONIAL STATUTE — PREROGATIVE RIGHT TO ENTERTAIN
APPEAL.

Re Will of Wi Matua (1908) A.C. 448. This was an application for leave to appeal from the native Appellate Court of New Zealand. Under a statute of New Zealand establishing the court the judgment of this court was declared to be final and conclusive, but the prerogative right of the King in Council to entertain an appeal was not expressly taken away. The questions involved were such as would have been appealable to His Majesty in Council before the establishment of the native court, and it was held by the Judicial Committee (Lords Robertson, Atkinson and Collins, and Sir A. Wilson) that the prerogative right to entertain the appeal could not be taken away except by express words. On the merits of the case, however, their Lordships did not see fit to grant leave to appeal.

BRITISH COLUMBIA PROCEDURE ACT, s. 4—(ONT. RULE 923)—
STATUTORY DUTY TO SUBMIT PETITION OF RIGHT TO LIEUTENANT-GOVERNOR—DAMAGES FOR BREACH OF STATUTORY DUTY.

Fulton v. Norton (1908) A.C. 451 was an action brought against the Provincial Secretary of British Columbia to recover damages, for his refusing to submit the plaintiff's petition of right to the Lieutenant-Governor as required by the Provincial Procedure Act, s. 4 (see Ont. Rule 923). Pending the action the defendant presented the petition and obtained his refusal of a fiat, and he set that up as a defence and paid \$5 into court as damages. At the trial, the judge dismissed the action. On

appeal to the Supreme Court of Canada a new trial was ordered on the ground that the plaintiff was entitled to have the damages assessed by a jury, and with this conclusion their Lordships of the Judicial Committee of the Privy Council (Lords Loreburn, L.C., and Lords Robertson and Atkinson and Sirs A. Wilson and Elzear Taschereau) agreed.

RULE ABSOLUTE FOR PROHIBITION TO JUSTICES—REFUSAL TO AWARD COSTS—APPEAL AS TO COSTS.

Rieken v. Justices for Yorke (1908) A.C. 454. In this case a rule for a prohibition against justices of the peace had been made absolute by the Supreme Court of South Australia, but the court had refused to order the justices to pay the costs of the proceedings. From this refusal of costs the appeal was taken to His Majesty in Council. The Judicial Committee of the Privy Council (Lords Robertson, Atkinson and Collins, and Sir A. Wilson) being of opinion that there had been no declining of jurisdiction on the subject of costs, nor any mistake in any matter of law, but a sound and proper exercise of discretion, dismissed the appeal with costs.

COLONIAL LEGISLATURE—VALIDITY OF STANDING ORDER OF LEGISLATIVE ASSEMBLY — EXCLUDING MEMBER OF LEGISLATURE ACCUSED OF CRIME.

Harnett v. Crick (1908) A.C. 470 was an appeal from the Supreme Court of New South Wales, and the question involved was whether an order of the legislative assembly, which suspended any member of the House accused of crime, until after a verdict, was valid. The Constitution Act, 1902, s. 15. empowered the Legislative Assembly to adopt rules for the orderly conduct thereof. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson and Sirs H. DeVilliers, A. Scoble and A. Wilson) held the order to be valid and dismissed the appeal.

CONTRACT FOR SALE OF LAND—CONSTRUCTION—UNCERTAINTY OF CONTRACT—SPECIFIC PERFORMANCE.

Douglas v. Baynes (1908) A.C. 477. This was an action for specific performance of a contract for the sale of land or for damages in case the defendant failed to convey pursuant to the order of the court. The contract in question provided for the transfer by the defendant to the plaintiff of a farm in the Transvaal, on which deposits of tin had been found, in consideration

of 3,700 shares of £5 each in a syndicate to be formed for the purpose of developing the same as a mining property, the 3,700 shares to represent the plaintiff's holding in a syndicate of 12,000 shares. The Supreme Court of the Transvaal refused specific performance on the ground that the syndicate, which had been formed, had not sufficient working capital to develop the property, as contemplated by the agreement. From this judgment the plaintiff appealed, but the Judicial Committee of the Privy Council (Lords Robertson, Atkinson and Collins, and Sir A. Wilson) dismissed the appeal, on the ground that the agreement was too uncertain in its terms. Their Lordships considered that there could not be any condition imported by implication into the contract as to sufficient working capital being provided for effectively developing the property, and to this extent they disagreed with the court below; but as to two matters "not raised in the pleadings or dealt with in the argument," viz., (1) Is the contract, as it stands, without any words being, by implication, imported into it, so ambiguous as to one material matter, that specific performance of it cannot on any principle of equity or natural justice be decreed? and, (2) If not, can damages be awarded instead? And the first of these questions they answer in the affirmative and the second in the negative. As to the first point they consider the word developing was ambiguous, and its meaning uncertain, and that as this contract to develop in fact constituted part of the consideration for which the land was agreed to be sold, the uncertainty as to its meaning disabled the court from enforcing the agreement, though the defendant might himself be responsible for the ambiguity, on the ground that it would be against conscience for a man to take advantage of the plain mistake of another, or at least that a Court of Equity would not assist him in doing so. As to the question of damages: as they were only claimed in the event of the defendant refusing to assign the farm within the time to be fixed by the court, their Lordships held they could not be awarded. In these circumstances each party was left to bear his own costs of the appeal and also of the appeal in the court below.

TAX SALE—ASSESSMENT ACT (R.S.O. 1897, c. 224) s. 184(3)—
3 EDW. VII. c. 21 (O.) s. 11—3 EDW. VII. c. 86 (O.), s. 8
—4 EDW. VII. c. 23 (O.), s. 148—NOTICE IN WRITING UNDER
R.S.O. c. 224, s. 184.

Toronto v. Russell (1908) A.C. 493 is an important decision on the subject of tax sales in which the Judicial Committee of

the Privy Council (Lords Robertson, Atkinson and Collins, and Sirs A. Wilson and Elzear Taschereau) have reversed the judgment of the Ontario Court of Appeal, 15 O.L.R. 484. The land in question belonged to Russell, the plaintiff, and was advertised to be sold on April 10, 1901, under the Assessment Act (R.S.O. c. 224) for taxes in arrears, and after an adjournment was bought by the city of Toronto. The city had advertised its intention to purchase in case the amount bid was less than the arrears due, but omitted to give Russell a notice in writing as required by 184 (3). In 1906 Russell commenced the action to set aside the sale on the grounds (1) that the land was insufficiently described in the assessment roll, and (2) that he did not receive the said notice. Their Lordships held that the defect, if any, in the assessment roll was cured by 3 Edw. VII. c. 86, s. 8, and secondly, that although the Act R.S.O. c. 224, s. 184(3) intended that the notice therein mentioned should be given to the owner, yet Russell could, and did waive it, and that even if he did not, it was "an omission on the part of an official" which was also cured by 3 Edw. VII. c. 86, s. 8; and an alleged defect in the certificate of sale given by the treasurer under s. 193 of the Assessment Act, c. 224, was also in like manner cured. And with regard to the plaintiff's alternative claim to redeem, their Lordships held that the period allowed by 3 Edw. VII. c. 68, s. 8, viz., three months after the passing of that Act, had not been extended by any subsequent legislation, and that therefore the plaintiff's action commenced in 1906 was too late.

POWERS OF PROVINCIAL LEGISLATURE—APPELLATE JURISDICTION
OF SUPREME COURT—R.S.M. c. 110, s. 36, LIMITING RIGHT
OF APPEAL ULTRA VIRES—B. N. A. ACT, 1867, s. 101.

In *Crown Grain Co. v. Day* (1908) A.C. 504, the Judicial Committee of the Privy Council (Lord Loreburn, L.C., and Lords Robertson and Atkinson, and Sirs A. Wilson and Elzear Taschereau) have affirmed the judgment of the Supreme Court of Canada, holding that it is not competent for a provincial legislature to limit the right to appeal to the Supreme Court contrary to any statute of the Dominion giving jurisdiction to that court. The Mechanics' and Wage Earners' Act of Manitoba (R.S.M. c. 110, s. 36) which purports to make the judgment of the King's Bench final and conclusive in actions to enforce mechanics' liens, was therefore declared to be ultra

vires. The important principle therefore seems to be established that the cases in which appeals may be had to the Supreme Court is a matter within the jurisdiction of the Dominion Parliament under s. 101 of the B. N. A. Act, 1867, and no provincial legislature can in any way curtail the right of appeal given by any Dominion statute.

POWERS OF PROVINCIAL LEGISLATURES—B. N. A. ACT, 1867, s. 92
(2)—ONTARIO SUCCESSION DUTY ACT (R.S.O. c. 24)—PRO-
VINCIAL TAXATION—PROPERTY OUT OF PROVINCE—ULTRA
VIREs.

Woodruff v. Attorney-General (1908) A.C. 508 is an appeal from the decision of the Ontario Court of Appeal in *Attorney-General v. Woodruff*, 15 O.L.R. 416, in which the Judicial Committee of the Privy Council (Lords Robertson, Atkinson and Collins, and Sir A. Wilson) have made a further contribution to our constitutional law. The action was brought by the Attorney-General of Ontario to recover succession duties on property of a deceased person which, at the time of his death, was situate outside the territorial limits of the province. The case was debated in the court below as turning on the effect of certain settlements made by the deceased of the property in question, and it was not until the present appeal that the point was taken that the local legislature had no power of taxation over property outside the province, and it was on this contention the case ultimately turned, their Lordships holding that under the B. N. A. Act (1867), s. 92 (2) the powers of taxation conferred on the local legislatures is strictly limited to "direct taxation within the province."

TRADE UNION—ACTIONABLE CONSPIRACY—RESOLUTION OF UNION
CALLING A STRIKE—MISDIRECTION.

Jose v. Metallic Roofing Co. (1908) A.C. 514. This was an appeal from the decision of the Court of Appeal, 14 O.L.R. 156, in the case of *Metallic Roofing Co. v. Jose*. The action was brought against a trade union for conspiracy in inducing the plaintiff's workmen to strike, and for maliciously combining to injure the plaintiffs, and an injunction and damages were claimed. Certain questions were submitted to the jury and answered by them in favour of the plaintiffs and damages were assessed at \$7,500, but in charging the jury MacMahon, J., in the opinion of the Judicial Committee (Lords Robertson, Atkin-

son, and Collins, and Sir A. Wilson) led the jury to believe that the calling out of the men on strike, by resolutions of the union, if those resolutions were the cause of the strike, was an actionable wrong, without regard to motive and without regard to the conspiracy alleged. This, in their Lordships' opinion, was so material a misdirection as necessitated a new trial of the action which was accordingly ordered.

STREET RAILWAY — REMOVAL OF SNOW FROM TRACKS — IMPLIED OBLIGATION TO REMOVE SNOW FROM STREETS.

Shea v. Reid-Newfoundland Co. (1908) A.C. 520. This was on appeal from the Supreme Court of Newfoundland. The Reid-Newfoundland Co., by s. 42 of their charter, were empowered to remove snow and ice from their railway tracks so as to operate their cars in the streets of the city of St. John, but conditioned upon their levelling the snow and ice on each side of the tracks to a uniform depth to be determined by the city's engineer, and so as not to impede the ordinary traffic of the streets. The point in dispute was whether in the event of its becoming necessary to remove snow from the streets in order to comply with the city engineer's direction as to level, it was the duty of the Reid-Newfoundland Co., or the city itself, to remove it. The courts below had held that it was not the duty of the Reid-Newfoundland Co., because that duty was not expressly imposed on them, but the Judicial Committee of the Privy Council (Lords Robertson, Atkinson and Collins, and Sir A. Wilson) took the contrary view, and held that the duty of removal rested on the company, and the appeal was accordingly allowed with costs.

BRITISH COLUMBIA—DIVORCE JURISDICTION OF SUPREME COURT OF BRITISH COLUMBIA.

In *Watts v. Watts* (1908) A.C. 573 an appeal was brought from the somewhat startling decision of Clement, J., to the effect that the Supreme Court of British Columbia had no jurisdiction in divorce, and notwithstanding that for the last fifty years the court had been acting on the assumption that it had such jurisdiction. By proclamations having the force of law, and British Columbia statutes, the civil laws of England, as they existed on 19th November, 1858, were declared to be in force in that province, and by a proclamation having the force of law, the Supreme Court of British Columbia was constituted

with complete cognizance of all pleas whatsoever, and to have jurisdiction in all cases, civil as well as criminal, arising within the colony of British Columbia. These provisions the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson and Collins) held, had the effect of conferring on the colonial court jurisdiction under the English Divorce and Matrimonial Causes Act, 1857, which came into force on January 11, 1858, and also under the Amending Act, 21 & 22 Vict. c. 108, which came into force on August 2, 1858.

Correspondence.

RE JUDICIAL UTTERANCES.

To the Editor, CANADA LAW JOURNAL:

SIR,—It is to be regretted that persons whose position would give weight to their utterances are not always guarded in their expressions. The other day an alderman of the city of Toronto is reported to have said that the ladies of his native city were largely addicted to drink, because he had been informed by some one that ladies often carried a flask of spirituous liquors to provide for emergency on their journey to the seaside. One would suppose this to be a very reasonable and common precaution, but the injurious statement was published broadcast by one of the leading papers in the Dominion. Of course his remark being made in the course of a temperance lecture may account for his intemperate language, but being a lawyer he ought to have known better.

Such a charge is of course so absurd as only to cause a smile, but occasionally a remark is made from the Bench, which may do serious harm; and one of that character I would venture now to call attention to.

An action against the Canadian Pacific Railway Company recently came before a Divisional Court of Ontario in which the defendants pleaded insufficient notice of the death of the man for whose representatives action was brought. The learned chief justice is reported to have said to the counsel for the company: "This is a very petty defence for a great corporation

like the Canadian Pacific Railway Company to set up. Why don't you fight it out on the merits, and seek to prove that you were not guilty of negligence." To which the counsel is said to have retorted: "Apparently I am not on the popular side of this motion," which elicited from His Lordship the remark: "You are not on the honest side."

If the above report be correct, and it is printed in inverted commas, one is led naturally to consider whether judges are appointed to decide questions of morals or points of law. With due respect to the learned chief justice, I would venture to suggest that as the company had a perfect right under the statute to raise this defence, it was not his province to discuss it from a purely moral or ethical standpoint. The company had the right to make this defence, and whether it was meritorious under the circumstances was not in question. If the judge thought such an enactment was undesirable it would be quite proper for him to make a suggestion to that effect in the proper quarter, or he might descend from the Bench and seek a repeal of the provision on the floor of the House of Assembly. But the real harmfulness of such a remark is, perhaps, made apparent by what seems to underlie the retort of the counsel. If it all means that the din of popular clamour against rich corporations, unconsciously of course, could affect the judicial mind, it is something to be guarded against. There is too much attention paid in these days to popular clamour. "Vox populi" is not "vox Dei."

ONLOOKER.

[Our readers can form an opinion of this matter as well as we can. We therefore make no comment, except to say that possibly our valued correspondent makes too much of the matter; and further, that, as to that part of the letter which takes exception to judges seeking to take the place of legislators and over-riding Acts of Parliament by judge-made laws to meet hard cases (which is, I presume, what our correspondent means), we would refer to the weighty words of Mr. Justice Meredith, J.A., in the case of *Johnston v. Dominion of Canada Guarantee and Accident Ins. Co.* (post infra). They are much in point.—EDITOR, C.L.J.]

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] FOX v. CORNWALL STREET RY. CO. [Nov. 10.

Duty as to highways—Municipality or company—Rails flush with street—Wearing down of highway.

This was an appeal by the plaintiff from the judgment of ANGLIN, J. (ante, p. 159). He had held that the municipality was liable for damages sustained owing to the wearing down of that portion of the highway adjacent; but his attention was not called on that occasion to R.S.O. 1897, c. 208, s. 23, which provides that unless otherwise agreed upon between the company and the municipality, the company shall at their own expense keep clean and in proper repair the streets between the rails and for 18 inches on each side of the rails.

Held, that as the accident was evidently caused by the defendants' neglect of their obligation in this respect, and the plaintiff was therefore entitled to judgment.

Appeal allowed.

G. I. Gogo, for plaintiff. Middleton, K.C., and C. H. Cline, for defendants.

Full Court.] [Nov. 10.

JOHNSTON v. DOMINION OF CANADA GUARANTEE & ACCIDENT
INS. CO.

Accident insurance—Conditions of policy—Affirmative proof of death—Notice of death—Time—Waiver—Forfeiture.

This was an appeal by the defendants from the judgment of BOYD, C. The action was brought under a contract in an accident insurance policy in favour of deceased and his representatives. One of the terms of the policy was that immediate written notice of any "accident or injury" should be given to the insurers at Toronto; and another was that unless "affirmative proof" of death should be so furnished within 13 months no

claim based thereon should be valid. There was no breach of the first condition, but there was of the second; and, in respect of this, the defendants claimed immunity from liability. It was, however, contended that the notice of "accident and injury," which, under the terms of the policy, was to be an immediate written notice, was also the "affirmative proof of death," which, if not furnished, "within 13 months from the time of such accident" was to make the claim invalid.

Held, that this notice did not satisfy the second requirement as to "affirmative proof" of death within 13 months. One thing was to be done immediately, the other, a very different one, was to be done within 13 months. If the one or the other were the same it was not necessary to give different periods within which each was to be done and provide for the doing of different things in each.

MEREDITH, J.A., who delivered the judgment of the court said: "There is, in my opinion, no reasonable evidence of any waiver of this condition. The correspondence regarding the proofs began with a distinct statement by the appellants that it was without prejudice, and throughout, with the exception of one letter, this position was expressly declared and maintained. We ought not to strain at every gnat in the insurers' way, and swallow every sort of camel that stands in the insured's way, to success in an action such as this.

The agreement which the parties chose to make must be held binding upon them, and upon each, respectively, alike, in the absence of any ground of legal or statutable defence, or of equitable relief such as fraud or mistake. I am quite unaware of any ground, statutable or otherwise, for making a new contract between the parties by eliminating the condition in question, and giving relief upon the contract in question thus emasculated. To treat the condition as a forfeiture which any court can, in its discretion, ignore, would be to create a revolution in the law of contracts of insurance; and it would be an extraordinary thing that it should be left until this late day to discover that the courts had such power. A condition requiring proof of loss under a contract of insurance is a reasonable, and almost, if not quite, a universal one; and one which is necessary for the prevention of fraud as well as for the speedy adjustment and payment of claims. The legislature has taken great pains to regulate contracts of insurance and to prevent unjust and unreasonable conditions being imposed; but has not prohibited conditions requir-

ing proofs of loss; on the contrary, it has fully recognized the need of such proofs, and made provisions respecting them. We must look to such legislation for any relief, such as the respondent seeks, from conditions such as that in question. It would, in my opinion, be legislation, not adjudication, to extend its provisions to analogous cases; and, if it were not, it would be difficult to find a case provided for in such legislation analogous to this so as to justify any such method of dealing with this case. It is impossible for me to think that s. 57 of the Judicature Act is applicable to such a case as this, to think that it gives to any judge power to—to use the words of a late eminent Master of the Rolls—“to run his pen through that part of the contract”: see *Eastern, etc., Co. v. Dent*, [1899] 1 Q.B. 835, and *Barrow v. Isaacs*, [1891] 1 Q.B. 417. To borrow again the words of a very eminent judge, to give relief in this fashion would be “taking a prodigious liberty with a contract.”

J. A. McIntosh, for plaintiff. *Blackstock*, for defendants.

HIGH COURT OF JUSTICE.

Cartwright, Master.]

[Oct. 27.]

SOVEREIGN BANK v. WILSON.

Summary judgment—Rule 603—Action by assignee of chose in action—Defence.

This was a motion by plaintiff for a summary judgment under Rule 603 in an action to recover \$642.21, the amount of an account for goods sold and delivered to the defendants by the former receivers and managers of the Imperial Paper Mills, duly assigned to plaintiff.

Held, that the defence disclosed in the affidavits in answer to the motion does not differ in substance from that set up in *Sovereign Bank v. Parsons*, not reported. In that case it was said by the Divisional Court: “If the receiver is personally liable for the price of the goods supplied for the purposes of his receivership, it follows that he must be personally responsible for breach of the contract entered into by him.” (See *Burt v. Bull* (1895) 1 Q.B. 276.) In the *Parsons Case* the defence was first set up by way of counterclaim. This, it was decided by MEREDITH, C.J., could not be done, and the Divisional Court held

that it was not available as a defence, even if the action had been brought by the Imperial Paper Mills. That being so judgment must go as asked.

Boland, for plaintiff. *Grayson Smith*, for defendants.

Falconbridge, C.J.K.B., Britton, J., Riddell, J.] [Nov. 12.

HIGGINS v. CANADIAN PACIFIC RY. CO.

Railway—Animals killed on track—Sheep going from owner's field into a neighbour's field adjoining the railway track—Fences and gates.

This was an appeal by the defendants from the judgment of the judge of the County Court of the County of Simcoe awarding damages to the plaintiff in an action for the loss of sheep killed on the defendants' railway line. The plaintiff had a flock of sheep on his farm which escaped out of the field in which they were enclosed into a field in the farm of a neighbour, through which ran the line of the defendants' railway. By a verbal agreement between these farmers the gate between the neighbour's field and the railway line was raised about 2 feet from the ground. It was probable that it was under this gate that the sheep made their way to the track. There was no proof of negligence or wilful act of omission on the part of the owner of the sheep (see s. 294) (4) of R.S.C. c. 37). This section provides that when any cattle or sheep at large, whether upon the highway or not, get upon the property of the company and are killed by a train, the owner of such animal so killed shall, except in the cases otherwise provided for by the next following section, be entitled to recover the amount of such loss from the company, unless the company establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent or of the custodian of such animal or his agent.

On behalf of the defendants it was contended that the sheep did not come within the meaning of the words "sheep at large," and that the right, if any, of the plaintiff must be under s. 254; and, consequently, that his rights were no higher than those of his neighbour through whose field the sheep escaped, and that the latter could not claim, for the reason that the defect was due to the verbal agreement between the parties. Under s. 254 the railway must erect and maintain cattle-guards on each side of the railway at the crossing and turn the fences into the cattle-guards,

the fences and cattle-guards being suitable and sufficient to prevent cattle and other animals from getting off the highways on to the railway.

Held, that the railway company having neglected the provisions of the above section and the animals having from such neglect got upon the railway and were killed, the railway company was liable; and it made no difference in this liability that the cattle had strayed through the lands of an adjoining owner.

Creswicke, K.C., for plaintiff. *Shirley Denison*, for defendants.

Province of Nova Scotia.

SUPREME COURT.

Full Court.]

[Nov. 17.]

SUTHERLAND v. GRAND COUNCIL OF PROVINCIAL WORKMEN'S ASSOCIATION.

Injunction—Discretion of judge refusing not reviewed—Corporate funds and business.

After the commencement of their action plaintiffs applied to a judge of the court for an interim injunction to restrain defendant corporation from carrying on business or dealing with the corporate funds pending the trial of the action. The grounds, supported by a number of affidavits, were (1) that certain persons appointed to office in the council were not persons who under the rules of the Association were qualified to hold office, and (2) that certain lodges of the Association were not properly represented at the meeting of council at which such officials were appointed.

The learned judge dismissed the application with costs, holding that the legality of the appointment of the officials in question should not be decided against defendants on an interlocutory application, and that it was not necessary to decide the rights of the lodges to representation at the meeting at which the appointments were made, it not being shewn that any different results would have followed; and also that to grant the injunction would have the effect of preventing the defendant corporation from doing business or carrying on its

affairs, and the case was not one in which the court, in the exercise of its discretion, on the evidence before it, should before trial interfere with the business of the defendant corporation or its funds.

The court dismissed plaintiff's appeal, holding that there was no reason for interfering with the discretion of the learned judge appealed from.

Harrington, in support of appeal. *Mellish*, K.C., contra.

Full Court.]

NICHOLLS v. RAWDING.

[Nov. 21.

Municipal election petition—Security—Removal of objection by deposit of cash—Construction of statute word “insufficient.”

The Nova Scotia Municipal and Town Controverted Elections Act, R.S. (1900) c. 72, s. 7(e) provides that “At the time of the presentation of the petition, or within three days afterwards, security shall be given on behalf of the petitioner for the payment of all costs, charges and expenses that may become payable by the petitioner, etc.” It is provided by s. 9(1), “. . . If an objection to the security is allowed it shall be lawful for the petitioner within a further prescribed time . . . to remove such objection by a deposit in the prescribed manner of such sum of money as is deemed by the judge to make the security sufficient.” There was a motion in this case to dismiss the petition, chiefly on the ground that the recognizance filed by petitioner was taken before a commissioner of the Supreme and County Courts, who had no authority to take the same, and the judge of the County Court while sustaining the objection as to the authority of the commissioner declined to hold the security absolutely void and permitted the petitioner to remove the objection by making a cash deposit as provided by s. 9 (1) quoted above.

Held, per TOWNSHEND, C.J., GRAHAM, E.J., and MEAGHER, J., that he was right in doing so and that respondent's appeal must be dismissed.

Held, also, that the word “insufficient,” in the Nova Scotia Act, applies as well to a security wrong in point of form or irregularly or insufficiently entered into, as it does to the amount of it or the sufficiency of the sureties or any other objection of that kind, and that this construction is sustained by the omission from the Nova Scotia Act of the words in the Eng-

lish Act from which it is copied which specially define the objections which may be taken.

DRYSDALE and LAURANCE, JJ., dissented, holding that as no valid security was given within the time prescribed by the Act, the objection could not be cured by a deposit of cash subsequently made.

Mellish, K.C., for appellant. *Milner*, for respondent.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] RE NORTH CYPRESS. [Oct. 20.

Liquor License Act—Local option by-law—Receipt of petition by municipal council.

Application for mandamus to compel the council of the rural municipality of North Cypress to submit a local option by-law to a vote of the electors under s. 62 of the Liquor License Act, R.S.M. 1902, c. 101, as amended by s. 2 of c. 26 of 7 & 8 Edw. VII. A petition duly signed has been sent in to the clerk of the municipality before the first day of October, but it had not been presented to or received by the council as there had been no session until after that date.

Held, that the receipt by the clerk of the petition was not a receiving of the same by the council within the meaning of the statute and that the judge appealed from was right in refusing a mandamus.

E. L. Taylor, for applicants. *A. J. Andrews*, for license holders.

KING'S BENCH.

Mathers, J.] MORDARSON v. JONES. [Oct. 20.

Assignment for creditors—Lien of execution creditor for costs when assignment made after execution placed in sheriff's hands.

After the plaintiff's writ of fieri facias had been placed in

the sheriff's hands, but before the goods in question had been actually seized the defendant made an assignment for the benefit of his creditors under the Assignments Act, R.S.M. 1902, c. 8. The sheriff refused to withdraw from possession of the goods except upon payment to him of his own and the plaintiff's costs, and the assignee obtained an order from the referee requiring the sheriff to withdraw without such payment.

Held, on appeal, that under s. 11 of the Executions Act, R.S.M. 1902, c. 58, the plaintiff had acquired a lien on the goods for his costs, which was not taken away, but, on the contrary, expressly recognized by ss. 8 and 9 of the Assignments Act, and that the appeal should be allowed with costs and the application of the assignee dismissed with costs.

Gillard v. Milligan, 28 O.R. 645; *Ryan v. Clarkson*, 17 S.C.R. 251, followed.

Howell, for the sheriff. *Hanneson*, for the plaintiff. *Monkman*, for the assignee.

Macdonald, J.]

HILL v. ROWE.

[Oct. 23.

Sale of land—Agreement to purchase on fixed date at option of vendor—Time, whether of the essence of the contract.

In consideration of the plaintiff purchasing an interest in certain lands and paying \$500 on account, the defendant signed an agreement that he would purchase the plaintiff's interest for the sum of \$600, if the latter desired to dispose of it on the 1st day of December, 1907. That day was a Sunday and the plaintiff was away from home until the 4th of December, when he at once notified the defendant that he wanted the agreement carried out. The defendant did not then repudiate the agreement, but asked the plaintiff to call again, saying that he had not the money just then. He afterwards refused to carry out the agreement and claimed that the plaintiff was bound to come on the very day fixed by the contract.

Held, that the circumstances shewed that it was never intended that time was to be the essence of the contract, that the plaintiff had made his demand within a reasonable time and that he was entitled to a verdict for the \$600 and costs.

Monahan, for plaintiff. *Dysart* and *Wemyss*, for defendant.

Cameron, J.] MORICE v. KERNIGHAN. [Oct. 28.

Sale of land—Liability of purchaser to pay off mortgage—Implied covenants—Assignability of right to indemnity.

W. by a transfer under the Real Property Act, R.S.M. 1902, c. 148, conveyed to the defendants the lands in question, expressly subject to two mortgages, one of which had been made by her to the plaintiff. On the same day an agreement was executed by W. and the defendants in which it was recited that the defendants had assumed the payment of the two mortgages mentioned. W. afterwards assigned to the plaintiff any claims she had against the defendants in law or equity and all her "rights to indemnity against any person or persons under any implied covenants in any transfer given" by her to the defendants.

Held, that the plaintiff could sue the defendants upon the covenant to indemnify set forth in s. 89 of the Real Property Act, which had been effectively assigned to the plaintiff and was entitled to recover the amount of his mortgage from the defendants.

O'Connor and Blackwood, for plaintiff. *Hudson and Garland*, for defendants.

Province of British Columbia.

SUPREME COURT.

Clement, J.] REX v. PERTELLA. [Nov. 6.

REX v. LEE CHUNG.

Criminal law—Charge to jury—Exception to—When to be taken—Application for a case stated—Crim. Code, ss. 1014, 1021.

After verdict, but before sentence, it is too late to move for a reserved case.

Sec. 1014, sub-s. 2, of the Code, provides that the court before which any person is tried may, either during or after the trial, reserve any question of law arising either on the trial, or on any proceedings preliminary, subsequent or incidental thereto, or arising out of the direction of the judge, for the opinion of the Court of Appeal.

Held, that this means that any reservation of a case after verdict must be of the court's own motion.

A. D. Taylor, K.C., for the Crown. *Farris*, for Lee Chung Woods, for Pertella.

Full Court.] *WILLIAMS v. HAMILTON.* [Nov. 12.

Vendor and purchaser—Contract for sale of land—Offer—Acceptance—Correspondence.

Judgment of HUNTER, C.J., affirmed on appeal. [Noted, ante, p. 86.]

Full Court.] *ENTWISLE v. LENZ & LEISER.* [Nov. 13.

Statutes, construction of—Judgments Act, Stat. 1908, c. 26, s. 3, Stat. 1906, c. 23, s. 74—Execution debtor—Dry legal trustee.

Execution creditors, in April, 1907, registered their judgment against the lands of the judgment debtor, pursuant to the Judgments Act. Previous to this, in January, 1906, the debtor conveyed a certain lot to plaintiff, who neglected, through ignorance of s. 74 of Land Registry Act, to register his conveyance until August, 1907, when he found this judgment registered against the lot. In an action to set aside this cloud upon his title, the learned trial judge ruled that s. 74 of the Land Registry Act, making registration of conveyances a sine qua non to the passing of any interest, legal or equitable, to lands governed.

Held, on appeal, that the Judgments Act gives the creditor only the interest in lands possessed by the judgment debtor, and that in this case the debtor having conveyed the land so long before the execution creditors' judgment was obtained, was a dry trustee of the land for the plaintiff.

S. S. Taylor, K.C., for appellant (plaintiff). *Higgins*, for respondents (defendants).

Bench and Bar.

Duncan Finlayson, of Arichat, Nova Scotia, barrister-at-law, to be judge of the County Court of District No. 7, comprising the counties of Cape Breton, Victoria and Richmond, in that province, in the room and stead of His Honour Daniel D. McKenzie, resigned.

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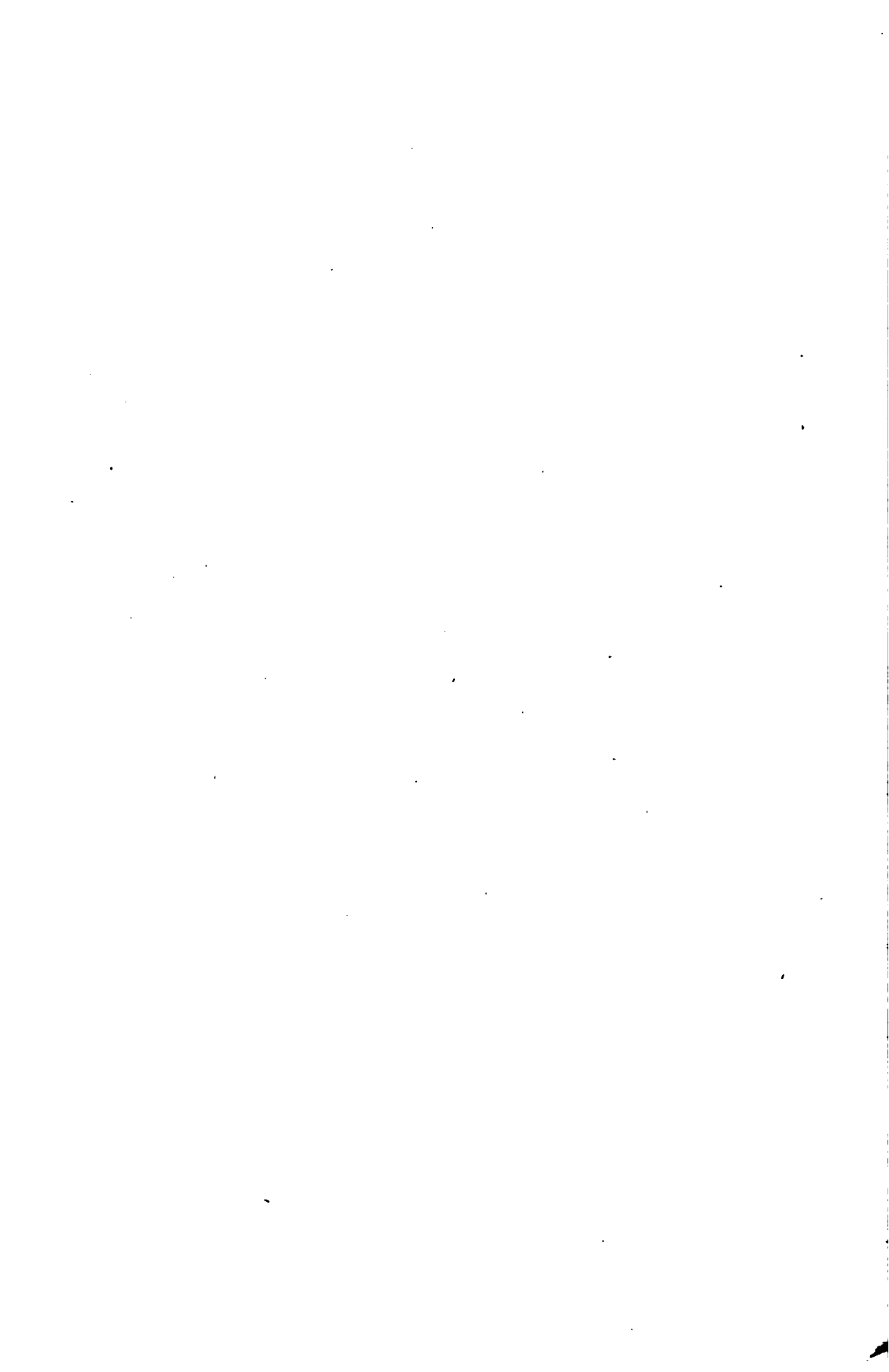
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